Petition

81-841

No. 81-A-203

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IN THE

Supreme Court of the United States

October Term, 1981

E. L. WIEGAND DIVISION,
EMERSON ELECTRIC CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) LOCAL 1020,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. Did the Third Circuit have the authority under the Court's decisions in *South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers,* 425 U.S. 800 (1976) and *NLRB* v. *Food Store Employees Union, Local 347,* 417 U.S. 1 (1974) to modify and enlarge upon the National Labor Relations Board's ("Board") order without remanding the case to the Board for reconsideration?

2. Did the Board and the Third Circuit unlawfully upset the balance of bargaining power between labor and management Congress established through the National Labor Relations Act ("Act") by compelling an employer to pay wage substitutes to employees during their 100% effective economic strike?

3. May the Board properly refuse to give effect to the express terms of a strike settlement agreement and the express sickness and accident benefit terms of a collective bargaining argreement?

4. May the Board and the Third Circuit retroactively overrule established Board precedent without notice so as to brand as unlawful an employer's conduct that was lawful when the employer acted?

List of Parties and Listing Pursuant to Rule 28.1

All parties to the proceeding in the court whose judgment is sought to be reviewed are:

E. L. Wiegand Division,
Emerson Electric Co.*

v.

National Labor Relations Board

and

International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW) Local 1020

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* Listing Required by Rule 28.1—E. L. Wiegand Division, as its name implies, is a division of Emerson Electric Company, and is not separately incorporated. The following is a list of the subsidiary corporations Emerson Electric Company directly or indirectly owns, excluding its wholly owned subsidiaries:

A. B. Chance de Mexico, S.A. de C.V.; Aichi-Emerson Electric Co.; Emerint, Inc.; Emerson Electric GmbH; Emerson Electric U.K. Limited; Emerson Systems International Ltd.; I.B.S., S.A.; LARCO, S.A.; Metaloy, Inc.; Ritz-Chance Industria e Comercio, S.A.; Ohkura-Rosemount Co., Ltd.; Arno-Skil Ferramentas Electricas Ltda.; Herramientas Electricas Skil, S.A.; Skil-Infra, S.A.; Swequipos, S.A.; InnoVen Capital Corporation; Tuflin, S.A.; Tuflin S.A.R.L.; Tuflin S.r.l.; Xomox S.A. de C.V.; Yamada/Day-Brite Ltd.; Rosemount Italia S.R.L.; Xomox International GmbH.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Reference to the Opinion Below

The opinion of the United States Court of Appeals for the Third Circuit is officially reported at 650 F.2d 463 and is unofficially reported at 107 LRRM 2112 and 91 L.C. ¶12,720.*

* The Third Circuit modified its opinion on August 3, 1981. The Third Circuit's opinion and the modification of its opinion on August 3 are set forth in the Appendix, which is submitted under a separate cover, at pp. 1a-35a. (References to the Appendix will hereafter be referred to as "—a".)

Statement of Grounds of Jurisdiction

(i) The judgment sought to be reviewed was entered on May 13, 1981. (78a-82a).

(ii) The Third Circuit denied the petition for rehearing with suggestion for rehearing in banc of E. L. Wiegand Division, Emerson Electric Co. ("Wiegand") on June 25, 1981. (83a-84a). On July 24, 1981, the Third Circuit granted Wiegand's motion for leave to file an amended petition for rehearing with suggestion for rehearing in banc over the objection of the respondent, International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW) Local 1020 ("Local 1020"). (85a-86a). The Third Circuit substantively amended portions of its opinion on August 3, 1981 (33a-35a) and denied Wiegand's amended petition for rehearing with suggestion for rehearing in banc on August 4, 1981. (87a-88a). On September 8, 1981, Justice Brennan extended the time in which Wiegand could file its petition for a writ of certiorari until November 2, 1981. (89a).

(iii) Not applicable.

(iv) This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. §1254(1) (1976).

Statutes Involved

Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("Act"), as amended (49 Stat 452, 29 U.S.C. §§158(a)(1), 158(a)(3) (1976)), provide, in pertinent part, that:

> Section 8. (a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

Section 7 of the Act (49 Stat 452; 29 U.S.C. §157 (1976)) provides as follows:

> Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities. . . .

Sections 10(a), 10(c), 10(e) and 10(f) of the Act (49 Stat 452, 29 U.S.C. §§160(a), 160(c) 160(e) and 160(f) (1976)) provide, in pertinent part, as follows:*

> Section 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: . . .
>
> * * *
>
> (c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board . . .

* Sections 8(a)3, 10(a), 10(c), 10(e) and 10(f) of the Act are set forth in full in the Appendix to this petition.

shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . .

* * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order. . . . Upon the filing of such petition, the court shall . . . have jurisdiction of the proceeding and of the question determined therein, and shall have power . . . to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the court shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction . . . to make and enter a

decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Statement of the Case

A. The Allegations of the Complaint and Basis for Federal Jurisdiction

On October 31, 1977, Local 1020 and Wiegand met for their eighteenth and final negotiating session in an attempt to reach a new collective bargaining agreement for Wiegand's employees at its Pittsburgh, Pennsylvania plant—all of whom are members of Local 1020. The prior collective bargaining agreement between the parties, dated October 1, 1974, expired by its terms at midnight October 31, 1977. Local 1020 and Wiegand were unable to reach agreement on a new collective bargaining agreement and with a strike a near certainty the parties discussed how various benefits would be provided to Wiegand employees during the strike. Local 1020 took the position that the Act required Wiegand to pay sickness and accident ("S&A") benefits to employees then receiving those benefits. Wiegand, relying upon the opinion of its counsel, prior Board precedent and the express terms of the 1974 collective bargaining agreement that was about to expire, advised Local 1020 that it had no legal obligation to continue paying S&A benefits to bargaining unit employees if a strike occurred at the expiration of the collective bargaining agreement. (113a-116a).*

* The impasse between Local 1020 and Wiegand over the payment of S&A benefits was finally resolved on February 28, 1978, when Local 1020 and Wiegand executed a new collective bargaining agreement which states, *inter alia,* that "all pending grievances, charges, civil and/criminal proceedings arising out of or in rela-

(footnote continued on next page)

On November 1, 1977, Local 1020 began its 100% effective economic strike against Wiegand that lasted until February 28, 1978. During those four months, Wiegand employees, all of whom were members of Local 1020, picketed Wiegand's Pittsburgh, Pennsylvania plant 24 hours a day. (4a-5a). The picket line violence, strike misconduct and mass picketing at Wiegand's plant ultimately led to a restraining order by a Pennsylvania court. No member of the bargaining unit offered to come to work or worked for Wiegand during the entire four month strike.

This case concerns 23 employees who were receiving S&A benefits when the strike began on November 1, 1977 and who received no S&A benefits from Wiegand during the strike. Each of these 23 employees was eligible to vote to authorize the strike, to ratify the labor contract Local 1020 negotiated, and shared in the wage and benefit improvements in the new contract. Moreover, several of the employees who seek S&A benefits during the strike publicly supported the strike against Wiegand by walking the picket line and working in Local 1020's strike office. (67a). In fact, one of the 23 claimants for S&A benefits is the Vice-President of Local 1020. Further, it is undisputed that all of these employees received strike pay from Local 1020 during the strike. (5a).

The sole basis for the claims by Local 1020 and the Board that Wiegand violated the Act arise from the collec-

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tion to actions taken or occurring during the strike . . . shall be withdrawn with prejudice or the parties shall cause them to be withdrawn" (109a-111a). The Union filed an unfair labor practice with the Board on December 14, 1977 concerning Wiegand's refusal to pay S&A benefits which should have been withdrawn by virtue of the express terms of the collective bargaining agreement. However, the National Labor Relations Board and the Third Circuit have improperly refused to give effect to the bargain Local 1020 and Wiegand struck.

tive bargaining agreement between Local 1020 and Wiegand dated November 1, 1974, which expired by its terms on October 31, 1977. That contract provided for weekly S&A benefits to Wiegand hourly employees "equal to 60% of an employee's gross average earnings per hour for a 40 hour week . . . payable to a maximum of 39 weeks". (90a-104a, 106a, and 108a). The conditions an employee has to meet for eligibility for S&A benefits are specified in the parties' written S&A benefits policy that provides that an employee is entitled to receive S&A benefits only if he or she was unable to work "*solely* because of illness or injury" (emphasis added). (112a). Accordingly, Wiegand does not pay, and is not obligated to pay, S&A benefits to employees who are laid off, on leave of absence or on vacation. (102a-104a).

B. Decisions Below

On December 14, 1977, Local 1020 filed a charge against Wiegand with the Regional Director of Region 6 of the Board alleging that Wiegand violated Sections 8(a)(1) and (3) of the Act when it terminated the S&A benefits 23 members of Local 1020's bargaining unit were receiving when the four month, often violent, totally effective, economic strike began. The Regional Director, correctly relying in major part on the Board's decision in *Southwestern Electric Power Co.*, 216 NLRB 522 (1975), refused to issue a complaint on February 15, 1978. (36a-38a). On February 24, 1978, Local 1020 appealed the Regional Director's refusal to issue a complaint to the Board's General Counsel who sustained the appeal on August 10, 1978 (39a-40a) and ordered the Regional Director to issue a complaint, which he did on August 31, 1978. (41a-45a). A hearing was held before Administrative Law Judge Thomas A. Ricci ("ALJ") on January 10-11, 1979 and on March 16, 1979, the ALJ ruled that Wiegand violated Sections 8(a)(1) and (3) of the Act by not paying S&A benefits during the strike to employees who were receiving those benefits when the strike began. (46a-63a).

Wiegand filed exceptions to the ALJ's decision with the Board on April 16, 1979 and a majority of the Board modified the ALJ's decision on December 19, 1979. (64a-77a). The Board ordered Wiegand to reimburse the disabled employees for lost S&A benefits, but no payment was required for the "periods subsequent to any employee's active participation in strike activity or public support therefor." (69a). The Board reasoned that the employer need not finance a strike against itself and that its order represented "a fair accommodation between the rights of employees and the interests of employers." (67a-68a). Member Penello dissented on the ground that the Board should adhere to its decision in *Southwestern Electric Power Company, supra,* which expressly authorized Wiegand to stop paying S&A benefits to members of the striking bargaining unit after the strike began. Member Jenkins dissented in part, urging that Wiegand did not have the right to stop paying S&A benefits even to employees who publicly supported the strike.

Wiegand filed its petition for review with the Third Circuit on December 28, 1979 and the Labor Board filed a cross-application for the enforcement of its order on March 3, 1980. Local 1020 filed its petition for review with the Third Circuit on March 21, 1980 and the Third Circuit consolidated the cases by order dated April 4, 1980. The Third Circuit in its decision dated April 13, 1981 rejected the view of the majority of the Board and adopted the reasoning of the dissenting opinion of Member Jenkins. The Third Circuit held that S&A benefits are accrued benefits which can *never* be denied because of an employee's public support of or participation in strike activity against the employer. Then, without remanding the case to the Board, the Third Circuit modified the Board's order by providing for the payment of S&A benefits to each of the 23 employees during the strike—regardless of their strike activity—and enforced the Board's order as modified.

Reasons for Granting the Writ

1. The Third Circuit's refusal to remand the case to the Board was improper and prejudicial. The Third Circuit should have remanded the case to the Board so that the Board could make additional findings and fashion a remedy that would effectuate the purposes of the Act. *See South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers,* 425 U.S. 800 (1976) and *NLRB* v. *Food Store Employees Union Local 347,* 417 U.S. 1 (1974). Instead, the Third Circuit usurped the Board's authority and formulated a new rule for employers to follow regarding the payment of S&A benefits to employees during a strike and applied that rule retroactively to Wiegand.

2. This case raises important issues of federal labor law which affect employers, insurance companies, labor organizations, and employees throughout the country.*

3. The Third Circuit's decision has altered the balance of power between labor and management in collective bargaining that Congress sought to achieve through the Act by compelling an employer to finance a strike against itself by paying wage subsidies to employees during a strike while they are walking the picket line. *See, e.g., New York Telephone Co.* v. *New York State Department of Labor,* 440 U.S. 519, 547 (1979) (Blackmun, J. concurring). Both the court below and the Board have misconstrued an employer's obligations with respect to wage-related benefits when its employees engage in an economic strike. An employer lawfully cannot be required to "finance an economic

* An extensive survey conducted by the Bureau of National Affairs, Inc. found that more than two-thirds of employers surveyed have similar sickness and accident plans for their employees. *BNA Employees Health and Welfare Benefits,* Personnel Policies Forum No. 122, pp. 9-13 (July, 1978) (117a-124a). Those plans are primarily insured through insurance companies but approximately 14% of the employers providing S&A benefits are, like Wiegand, self-insurers. (121a).

strike against it by remunerating the strikers for work not performed." *Philip Carey Mfg. Co.*, 140 NLRB 1103, 1123 (1963), *modified on other grounds*, 331 F.2d 720 (6th Cir. 1964); *General Electric Co.*, 80 NLRB 510 (1948).

4. The Third Circuit's decision seriously impedes the ability of employers and unions to end strikes because it refuses to enforce the strike settlement provisions of the 1978 collective bargaining agreement between Wiegand and Local 1020. This failure to enforce a strike settlement agreement conflicts with the Fifth Circuit's decision in *Gulf States Manufacturers Inc.* v. *NLRB*, 579 F.2d 1298 (5th Cir. 1978), which upheld a similar settlement agreement between an employer and a union. (*See, also, Retail Clerks Locals 128 and 633* v. *Lion Dry Goods, Inc.*, 369 U.S. 17, 27-28 (1962), where the Court held that strike settlement agreements are enforceable under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a), because such agreements are "significant to the maintenance of labor peace between [employers and labor organizations]".)

5. The Third Circuit and the Board improperly refused to honor the express terms of Wiegand's 1974 collective bargaining agreement with Local 1020 pertaining to the payment of S&A benefits.

6. The Board and the Third Circuit now are in direct conflict with respect to the payment of S&A benefits during a strike, since the Board continues to hold that disabled employees forfeit sick leave benefits when they affirmatively support a strike against their employer. *See Walter Motor Truck Co.*, 256 NLRB No. 166 (July 1, 1981).

7. The Third Circuit's decision adds to the growing conflict among the circuits as to which employee benefits are accrued and cannot be terminated by an employer during a strike. *Compare Buchholtz* v. *Swift & Co.*, 609 F.2d 317, 326-27 (8th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980) with *Schneider* v. *Electric Auto-Lite Co.*, 456 F.2d 366, 372 (6th Cir. 1972).

8. The Third Circuit improperly applied its new rule retroactively against Wiegand and declared unlawful conduct which was lawful when Wiegand acted. Significantly, the Board in this case also reversed the rule it had adopted regarding the payment of S&A benefits four years earlier in *Southwestern Electric Power Co., supra,* and, without explanation, applied its new rule retroactively to Wiegand despite the fact that it is undisputed that Wiegand relied upon *Southwestern Electric* when it terminated S&A benefits to its employees.

Review by this Court is therefore necessary to avoid further conflict regarding the rights of employers and employees during strikes and to rectify the procedural and prejudicial errors of the Board and the Third Circuit.

I.

The Third Circuit did not have the authority to modify the Board's order and enforce the order as modified without remanding the case to the Board to make additional findings and to fashion a remedy which would effectuate the purposes of the Act.

The function of courts of appeals in reviewing determinations of administrative agencies such as the Board is to reveal the agency's errors of law and then to remand the case to the agency for reconsideration. *FPC* v. *Idaho Power Co.,* 344 U.S. 17, 20-21 (1952), *rehearing denied,* 344 U.S. 910 (1952). The rationale for this rule is that Congress has invested the Board, and not the courts, with broad discretion "to take such affirmative action . . . as will effectuate the policies of the Act." 29 U.S.C. 160(c); *see, e.g., Golden State Bottling Co.* v. *NLRB,* 414 U.S. 168, 176 (1973). Thus, it was error for the Third Circuit to have enlarged the Board's order in this case and enforced the Board's order as enlarged without remanding the case to the Board.

The Court previously has granted writs of certiorari to correct such errors by courts of appeals regarding Board

orders in *South Prairie Construction Co.* v. *Local No. 627 International Union of Operating Engineers,* 425 U.S. 800 (1976), and *NLRB* v. *Food Store Employees Union, Local 347,* 417 U.S. 1 (1974). Wiegand's petition for a writ of certiorari should similarly be granted. The Third Circuit's failure to remand this case to the Board deprived the Board of the opportunity to make additional findings, to correct erroneous factual findings, to decide whether the Third Circuit's decision should be applied retroactively and to construct a remedy that would best effectuate the purposes of the Act. In addition, a remand in this case could have prevented the current conflict between the Board and the Third Circuit as to which employees, if any, are entitled to S&A benefits during a strike. [*See,* the Board's recent decision in *Walter Motor Truck Co.,* 256 NLRB No. 166 (July 1, 1981) (where the Board held that an employer is not obligated to pay sick leave benefits to disabled employees during a strike if it can establish that those employees publicly supported the strike).]

The facts in *Food Store Employees Union, supra,* and this case are strikingly similar and the Court's reasoning in that case applies with equal force here. In *Food Store Employees Union,* as in this case, the court of appeals enlarged an order of the Board concerning the remedy for an employer's alleged unfair labor practice without remanding the case to the Board. The Court found that the court of appeals had exceeded its authority under Sections 10(e) and 10(f) of the Act by not affording the Board an opportunity to fashion a remedy in light of the court of appeals' decision. The Court found that such a remand "afford[s] the Board the opportunity, through additional evidence or findings, to reframe its order to better effectuate [the policies of the Act] . . . [and] a remand was necessary because the Board should be given the first opportunity to determine whether the new policy should be applied *retroactively*" (emphasis added) (citations omitted). *Id.* at 10. Additionally, in *South Prairie Construction Co.* v. *Local*

627, International Union of Operating Engineers, 425 U.S. 800, 805 (1975) the Court also granted certiorari and remanded the case to the Board, noting,

> It is a guiding principle of administrative law, long recognized by this Court, that 'an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.' *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 145 (1940).

The Third Circuit similarly usurped an administrative function of the Board in this case by framing and implementing a modified order with respect to Wiegand without first remanding the case to the Board. If the Third Circuit properly had remanded the case to the Board, the Board could have decided whether or not to implement the Third Circuit's decision retroactively. Moreover, the Board would have been given the opportunity to make additional findings and take additional evidence in accord with the Third Circuit's opinion. This opportunity for the Board to make additional findings is crucial in this case because the Third Circuit's decision is premised upon a completely erroneous fact for which there is absolutely no support in the record.

The Third Circuit based its decision that Wiegand's S&A benefits are accrued benefits upon its erroneous belief that S&A benefits varied according to an employee's length of service with Wiegand. There is no evidence in the record to support this finding. The fact is that all Wiegand employees, once they have completed their probationary period, are entitled to S&A benefits for as long as they are unable to work and work is available for them up to a maximum of 39 weeks. (90a-112a). Wiegand pointed out this erroneous finding to the Third Circuit in its amended petition for rehearing, but the Third Circuit refused to give

the Board the opportunity to take additional evidence as to the true and undisputed facts on this point.

Wiegand therefore respectfully submits that the Court should grant certiorari and order the Third Circuit to remand this case to the Board.

II.

The Board and Third Circuit have upset the balance of bargaining power between labor and management Congress established in the Act by compelling the payment of wage substitutes to employees during a strike.

The Court previously has held that "neither States nor the Board is afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful." *Lodge 76, International Association of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Commission,* 427 U.S. 132, 149-150 (1976) quoting *NLRB* v. *Insurance Agents,* 361 U.S. 477 (1960). Congress has made specific weapons of labor and management unlawful under the Act and Congress intended that unregulated conduct be left to "the free play of economic forces and not subject to regulation by the NLRB." *New York Telephone Co.* v. *New York State Department of Labor,* 440 U.S. 519, 547 (1979) (Blackmun, J. concurring). Thus, the Board has recognized repeatedly that an employer cannot be compelled to pay wages or their equivalents to employees during a strike since no work has been performed for the employer. *Philip Carey Mfg. Co.,* 140 NLRB 1103, 1123 (1963), *modified on other grounds,* 331 F.2d 720 (6th Cir. 1964) and *General Electric Co.,* 80 NLRB 510 (1948). *See, also, Towne Chevrolet,* 230 NLRB 479 (1977) and *Ace Tank and Heater Co.,* 167 NLRB 663 (1967) (where the Board held that an employer was not obligated to pay insurance premiums or medical expenses employees incurred during a strike).

The Board held in this case that Wiegand's employees had a protected right to receive sickness and accident benefits during a strike. (66a). The Board's attempt to deny Wiegand its right to cease paying wage substitutes, such as S&A benefits, to its employees during a strike is simply beyond its statutory powers under the Act. Wiegand lost income and sales during the strike and the Act does not compel Wiegand to ease the economic burden of its employees during a strike by paying wage substitutes such as S&A benefits to those employees who are part of the striking bargaining unit. Since the Board correctly holds that an employer has the right to terminate the wages of members of a union who are not at work because they are on sick leave, vacation or off shift when their union brothers in the same bargaining unit strike in breach of contract, *Bechtel Corp.*, 200 NLRB 503, 507, 512-13 (1972); *Marathon Elec. Mfg. Corp.*, 106 NLRB 1171, 1176-78 (1953), *aff'd*, 223 F.2d 338, 343 (D.C. Cir.), *cert. denied*, 350 U.S. 981 (1955), Wiegand certainly had the right to stop S&A benefits for bargaining unit members, all of whom were members of Local 1020, during Local 1020's 100% effective strike here.

Significantly, several of the employees to whom both the Board and the Third Circuit directed Wiegand to pay S&A benefits walked the picket line against the Company or worked in the Local 1020's strike office, and under this direction will receive the equivalent of wages from Wiegand for the time they were engaged in such strike activity. Moreover, each of the 23 employees to whom S&A benefits from Wiegand during the strike have been awarded received strike pay from Local 1020 during the entire strike and signed releases authorizing Local 1020 to recoup this strike pay from any S&A payments the 23 employees receive from Wiegand if Local 1020 is ultimately successful in this case. (5a). Thus, by ordering Wiegand to pay S&A benefits to employees during the strike, the Board and the Third Circuit are actually compelling Wiegand to

replenish Local 1020's strike fund. This results in an unwarranted shift of the economic burden of a strike from the union to the employer.

The Board and the Third Circuit further erred by finding that S&A benefits are accrued or vested benefits, which are not the equivalent of wages. Wiegand's S&A plan, like other S&A plans, is a wage continuation plan insuring employees against the loss of *wages* due solely to sickness or accident. Like any type of insurance, Wiegand's S&A plan only indemnifies an employee against a specific type of risk and was never designed to indemnify an employee against *all* contingencies that might cause an employee to lose wages such as a plant shutdown, a layoff due to lack of work or a 100% effective economic strike. Further, S&A benefits do not accumulate and cannot be deferred like other accrued or vested benefits.

Wiegand's S&A plan provides for the same type of wage continuation plan as the employer's plan in *Southwestern Electric Power Co.*, 216 NLRB 522 (1975), because it is undisputed that both plans provide for *wages* an employee would have earned if the employee had not been sick or disabled.* The Board's and the Third Circuit's emphasis on their erroneous conclusion that Wiegand's S&A benefits are tied to an employee's length of service with the Company is not only factually incorrect** but irrelevant with respect to whether or not those benefits are accrued. For example, length of service is also a common and valid factor for paying higher wages, but that does not mean that higher paid senior employees are entitled to have their *wages* continue during a strike.†

* The Third Circuit held that the sick leave benefits for employees in *Southwestern Electric* constituted *wages*, but refused to apply the same logic with respect to Wiegand's S&A plan. (19a).

** See the discussion of this factual error at pp. 13-14, *supra*.

† Indeed, the wage continuation plan in *Southwestern Electric* depended in part upon "the employees' length of service." *Southwestern Electric, supra* at p. 525.

Courts routinely recognize that arbitration decisions should be followed in these cases because labor arbitrators have unique experience in interpreting labor contracts. *See United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960); *S. J. Groves & Sons* v. *IBT Local 627*, 581 F.2d 1241, 1245 (7th Cir. 1978); *Westinghouse Electric Corp.* v. *IBEW Local 1805*, 561 F.2d 521, 523 (4th Cir. 1977), *cert. denied*, 434 U.S. 1036 (1978); *NLRB* v. *Universal Services, Inc. and Associates*, 467 F.2d 579, 584 n.5 (9th Cir. 1972); *Schneider* v. *Electric Auto-Lite Co.*, 456 F.2d 366, 371-72 (6th Cir. 1972); and *Local 1912, IAM* v. *United States Potash Co.*, 270 F.2d 496 (10th Cir. 1959), *cert. denied*, 363 U.S. 845 (1960). A review of decisions of arbitrators construing contracts providing similar S&A benefits confirms that S&A benefits and sick leave benefits are the equivalent of wages and hence need not be paid to employees during a strike.* The rationale underlying

* *Givaudan Corp.*, 68 LA 337 (A. Brent 1977) (employer did not violate contract by discontinuing sick leave payments during strike since sick leave is dependent upon loss of scheduled work); *Airco Alloys and Carbide Co.*, 50 LA 1223 (L. Kesselman 1968) (disability make-up pay not a vested benefit and employer can terminate this benefit during a strike); *Trans World Airlines*, 41 LA 312 (N. Cayton 1963) (employer not contractually bound to continue to pay sick leave to employees during a strike).

Arbitrators also have held that employees are not entitled to similar benefits during layoffs, holidays or plant shutdowns because these benefits, like wages, are not vested benefits. *R & G Sloane Manufacturing Co.*, 56 LA 962, 963 (I. Helbling 1971) (employee not entitled to a windfall, *i.e.*, sick leave pay, when a mass layoff occurs for three days while the employee is on sick leave because sick leave is only "to indemnify employees against lost earnings because of illness [and] the Agreement does not indemnify against earnings lost because of a lack of work"); *Union Carbide Corp.*, 65-2 ARB ¶8795 (W. McCoy 1965) (employer not obligated to pay disability benefits to employee on layoff since employee's loss of pay due to layoff not illness); *Printing Industries of New York*, 43 LA 998 (I. Feinberg 1964) (employee not entitled to unused sick leave pay after termination since it is not a vested right); *Curtiss-Wright Corp.*, 37 LA 259 (V. Jensen 1961) (employees not entitled to sick leave pay during layoff because sick leave benefits are not vested and are payable only when illness causes the absence from work, not when work is unavailable due to other reasons).

these decisions is that, contrary to the Third Circuit's decision, sick leave and S&A benefits are *not* vested or accrued benefits and are designed only to "protect the injured employee from loss of [wages] he might have earned had he not been hurt. . . ." *Airco Alloys and Carbide Co.*, 50 LA 1223, 1226 (L. Kesselman 1968).

Significantly, the facts in *Airco Alloys and Carbide Co., supra* and *Trans World Airlines, supra,* are almost identical to the facts of this case and in both cases the employer's right to discontinue sick leave benefits to employees during a strike was upheld. Thus, in *Trans World Airlines, supra* at p. 313, the arbitrator held that the contract,

> should be construed to mean that a man is to be paid not because he is sick, but because, and when, his illness prevents him from working. For example, he would not be entitled to sick pay during an off period such as a weekend . . . he would not be entitled to demand sick pay for an illness which befell him during his vacation period. Viewed fairly and realistically, the arrangement here created was to provide pay for the employee who is unable to work because of illness, not for the employee who happens to become ill at a time when because of a company-wide shutdown there is no work opportunity for him . . . there were no earnings opportunities for any [employees].

Wiegand's S&A plan similarly provides for wage subsidies as S&A benefits only when work is available to its employees. Therefore, the Third Circuit's decision actually provides a windfall for Wiegand's employees during their strike by compelling the payment of wage substitutes to the employees when the plant was completely shut down.

Wiegand respectfully submits that decisions of the Third Circuit and the Board that it is now unlawful for an employer to cease paying wages and wage substitutes, such as S&A benefits, to employees during a strike have upset the bargaining balance between labor and management

Congress established through the Act by tipping the scales in favor of labor. Review by this Court is therefore necessary to prevent this unauthorized shift of the employees' economic burden during a strike to their employers who already carry the burden of lost production and lost business during a strike.

The decisions of the Third Circuit and the Board have upset the stability of collective bargaining agreements throughout the country by adopting an interpretation for sick leave and S&A benefits which is contrary to the "industrial common law" incorporated into all collective bargaining agreements, *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). Moreover, the Third Circuit's decision adds to the growing conflict among the circuits as to which employee benefits cannot be withheld during a strike because they are vested or accrued. *Compare, Buchholtz* v. *Swift & Co.*, 609 F.2d 317, 326-27 (8th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980) with *Schneider* v. *Electric Auto-Lite Co.*, 456 F.2d 366, 372 (6th Cir. 1972). The Court needs to resolve this conflict and delineate the respective rights of employers and employees regarding employee benefits during a strike.

III.

The Board and the Third Circuit rewrote the collective bargaining agreement between the parties by refusing to honor the express terms of the strike settlement and the sickness and accident benefit provisions of their contract.

The Court has held that the Board cannot rewrite the collective bargaining agreement between an employer and a union by modifying or ignoring the terms of their agreement. *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 106 (1970). However, both the Board and the Third Circuit have refused to give effect to the express terms of the collective bargaining agreement between Wiegand and Local 1020. This refusal to give effect to the terms to which Wiegand

and Local 1020 voluntarily agreed is based upon the mistaken belief that the language of Wiegand's S&A plan does not limit the payment of S&A benefits to time lost from work due solely to sickness or injury, and the erroneous finding that the strike settlement agreement is unenforceable.

The 1974 collective bargaining agreement between Wiegand and Local 1020 that expired as Local 1020's often violent, four-month strike began provided for the payment of S&A benefits where an employee was unable to work "*solely*" because of illness or injury and did not provide for S&A benefits where work was unavailable to an employee because of a plant shutdown. However, the Third Circuit and the Board completely ignored the express terms of Wiegand's S&A plan, by finding that work need not be available for an employee to receive S&A benefits.* The lack of any merit to the findings of the Board and the Third Circuit concerning the construction of Wiegand's S&A plan is shown by Wiegand's undisputed past practice of not paying S&A benefits during other times employees are not at work such as layoffs, leaves of absence or vacation.

Even if one were to adopt the erroneous view of the Board and the Third Circuit that S&A benefits are not similar to wages and are accrued or vested, such benefits are subject to divestment upon the happening of certain events.** Wiegand employees are only entitled to S&A

* The Third Circuit erroneously states that Wiegand has pointed to no language limiting the rights of employees to S&A benefits (13a), despite the fact that on the same page of its opinion it highlights language in the plan that S&A benefits are only payable when an employee is unable to work "solely because of" illness or injury. (13a). The Board also ignored the terms of Wiegand's S&A plan because of its mistaken belief that Wiegand's employees had a Section 7 right to S&A benefits during the strike. (66a).

** The Third Circuit acknowledged that accrued benefits are defeasible (12a) but never addressed this issue with respect to Wiegand's S&A plan.

benefits if work is available. The express contract language says this, Wiegand's past practice of terminating S&A benefits during layoffs supports this conclusion, and there is nothing that would support a contrary inference. Thus, even if Wiegand's S&A benefits are mistakenly deemed to be accrued or vested, they are subject to divestment upon a plant shut-down caused either by lack of work or, as in this case, a 100% effective economic strike. *See, e.g., Kansas City Power & Light Co.*, 244 NLRB 620 (1979), *aff'd*, 641 F.2d 553 (8th Cir. 1981) (employees becoming ill during a strike are *not* entitled to sick leave benefits found to have accrued).

Wiegand's good faith reliance upon the express terms of its collective bargaining agreement with Local 1020 and its past practice with respect to the payment of S&A benefits when work was unavailable show that it properly terminated S&A benefits to its employees during the strike. Under these circumstances, neither the Board nor the Third Circuit properly can find that Wiegand violated Sections 8(a)(1) and 8(a)(3) of the Act since these benefiits were withheld for legitimate contractual reasons and there has been absolutely no showing that these benefits were withheld for an anti-union reason. *NLRB* v. *Borden, Inc.*, 600 F.2d 313 (1st Cir. 1979); *Retail Clerks Local 455* v. *NLRB*, 510 F.2d 802, 807 (D.C. Cir. 1975).

More important, any doubts about Wiegand's contractual obligations were resolved by the strike settlement agreement Wiegand and Local 1020 executed on February 28, 1981. (109a-111a). The strike settlement agreement expressly absolved *both* parties from all "pending grievances, charges, civil and/or criminal proceedings arising out of or in relation to action taken or occurring during the strike . . .". The Company agreed to take no action against Local 1020 or its members for picket line misconduct or other illegal activities during the strike and Local 1020 agreed not to file or pursue grievances, unfair labor charges or court actions seeking damages or other relief

from the Company for any of its activities relating to or arising out of the strike. Local 1020 filed the underlying unfair labor practice charge in this case on December 14, 1977 and this was the only "charge" pending at the time the settlement agreement was reached. In accord with the terms of the settlement agreement, Local 1020 should have withdrawn this charge. However, the Third Circuit and the Board refused to recognize the bargain Wiegand and Local 1020 struck and proceeded to address the merits of Local 1020's charge.

The same "congressional policy embedded in our labor laws" that employees and unions honor their collective bargaining agreements requires unions and employers to honor the strike settlement provisions of their collective bargaining agreements. *Retail Clerks Local 455* v. *NLRB*, 510 F.2d 802, 807 (D.C. Cir. 1975). Indeed, in *Retail Clerks Locals 128 and 633* v. *Lion Dry Goods, Inc.*, 369 U.S. 17, 27, 28 (1962), the Court noted that courts should enforce strike settlement agreements "on behalf of or against labor organizations . . . and industrial peace can be best obtained only in that way" (citations omitted). The Court further stated that "responsible and stable labor relations would suffer" if strike settlement agreements are not enforced. *Id.* at 27.

The Board and the Third Circuit have violated this congressional policy by refusing to require Local 1020 to honor its unambiguous promise to withdraw the charge in this case contained in the strike settlement. This promise to resolve the contractual dispute as to eligibility for S&A benefits was part of the consideration Wiegand received for its agreement to pay better wages and benefits throughout the term of the new three-year collective bargaining agreement and Wiegand's promise not to seek damages, fines or other actions against Local 1020 or its members for their activities relating to the strike, *i.e.*, picket line misconduct. Similarly, in *Gulf States Manufacturers, Inc.* v.

NLRB, 579 F.2d 1298 (5th Cir. 1978), the Fifth Circuit held that the Union was bound by its agreement to withdraw 8(a)(1), 8(a)(3) and 8(a)(5) charges against the employer and was estopped from raising such charges because the company had relied upon such representations to its detriment. Indeed, the NLRB has also upheld similar amnesty language in other strike settlement agreements. *See Stationary Engineers Local 39*, 240 NLRB 1122 (1979) and *Retail Clerks Local 1364*, 240 NLRB 1127 (1979); *see, also, Coca-Cola Bottling Co. of Los Angeles*, 243 NLRB 501 (1979).

The rationale for upholding such amnesty provisions in strike settlement agreements is the congressional policy to "encourage the peaceful settlement of labor disputes through the practice and procedure of collective bargaining." *Retail Clerks Local 1364, supra* at p. 7. Similarly, in *Stationary Engineers Local 39, supra* at p. 7, the Board held:

> Respondent's conduct with respect to Davis was clearly in derogation of the amnesty agreement, which was the product of the parties' negotiations. The discipline imposed against Davis therefore was in contravention of the basic policy of the Act of encouraging the practice and procedure of collective bargaining. Furthermore, Respondent's actions in derogation of a strike amnesty agreement run counter to the overriding national policy of favoring the peaceful resolution of labor disputes.

The Third Circuit found that the strike settlement provisions in the collective bargaining agreement between Wiegand and Local 1020 are not binding upon Local 1020 because the terms are allegedly against public policy. The Third Circuit bases its decision on its mistaken belief that collectively bargained agreements between employers and unions can *never* provide for the adjustment or settlement of unfair labor practices concerning contractual rights.

The Third Circuit's refusal to recognize the validity of strike settlement agreements seriously undermines the ability of employers and unions to end strikes by absolving one another from liability for its acts related to the strike and directly conflicts with the Fifth Circuit's decision in *Gulf States Manufacturers Inc.* v. *NLRB,* 579 F.2d 1298 (5th Cir. 1978). Since many strike settlement agreements contain similar provisions, the Third Circuit's decision can only lead to longer and more bitter strikes in the future. *See, e.g., Retail Clerks Locals 128 and 633* v. *Lion Dry Goods, Inc., supra* at p. 27.

In sum, the Board did not have the power to unilaterally alter the terms of the collective bargaining agreements between Wiegand and Local 1020. Review by this Court is necessary in order to correct this prejudicial error and to prevent the Board from refusing to uphold similar strike settlement agreements in the future.

IV.

The Third Circuit and the Board improperly applied their decisions retroactively in this case.

The Court has stated that administrative agencies should proceed *prospectively* when they formulate new rules in quasi-judicial adjudications and should not seek to establish liability, by way of fines or damages "for past actions which were taken in good faith reliance on Board pronouncements." *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 295 (1974). *See, also, Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 106-07 (1971); *SEC* v. *Chenery Corp.,* 332 U.S. 194, 203 (1947); and *NLRB* v. *Guy F. Atkinson Co.,* 195 F.2d 141 (9th Cir. 1952). Significantly, the issue Local 1020's charge against Wiegand raised did not involve a case of first impression for the Board. Rather, Local 1020's charge concerns "a case where the Board had confronted the problem before, had established an explicit standard of conduct and

now attempts to punish conformity to that standard under a new standard and subsequently adopted." *Retail, Wholesale & Department Store Union (Coca-Cola Bottling Works)* v. *NLRB*, 466 F.2d 380, 391 (D.C. Cir., 1972); *see, also, NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.) (refusal to enforce a Board order against an employer because the Board sought to apply a new rule retroactively); *NLRB* v *E & B Brewing Co.*, 276 F.2d 594 (6th Cir. 1960), *cert denied*, 366 U.S. 908 (1961) (refusal to give effect to a Board order that retroactively held a contractual clause illegal); *NLRB* v. *Local 176, United Brotherhood of Carpenters*, 276 F.2d 583, 586 (1st Cir. 1960) (refusal to enforce Board order that would have resulted in a windfall to employees because the employer's conduct previously was lawful and was held unlawful only after it had occurred).

The Board in this case expressly overruled a decision it had reached four years earlier in *Southwestern Electric Power Co.*, 216 NLRB 522 (1975), where it held that an employer need not pay S&A benefits during a 100% effective economic strike. Rather than apply its new rule prospectively, the Board merely stated that it was overruling *Southwestern Electric* in this case (66a) and, without explanation, applied its new rule retroactively against Wiegand. The Board's decision is particularly unfair since it is undisputed that Wiegand relied upon *Southwestern Electric* in refusing to pay S&A benefits to its employees during the strike. Moreover, despite Wiegand's undisputed reliance upon prior Board precedent, the Board erroneously found that Wiegand *intended* to withhold S&A benefits from all of its employees during the strike for anti-union reasons.

There is simply no evidence in the record to support the Board's finding of anti-union motivation where, as here, the Board retroactively changed the rule on which the em-

ployer relied.* As a result, Wiegand's refusal to pay S&A benefits during the strike—conduct which the Board previously had sanctioned—was now, without notice or explanation, branded as unfair.** As the Ninth Circuit aptly stated in *NLRB* v. *Guy F. Atkinson Co.*, 195 F.2d 141, 149 (9th Cir. 1952),

> The inequity of such an impact of retroactive policy making upon a respondent innocent of any *conscious* violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing any system of law abhors. (Emphasis added.)

Wiegand respectfully submits that it is patently unfair and inequitable for the Third Circuit and the Board to apply their decisions retroactively in this case, particularly in light of Wiegand's undisputed careful reliance on established Board precedent.

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* As a result of upholding the Board's finding of Wiegand's anti-union motivation in refusing to pay S&A benefits, the Third Circuit never addressed the issue of whether Wiegand's actions were "inherently destructive" of Section 7 rights so that Wiegand's unlawful subjective intent would not be necessary in order to find an unfair labor practice (14a-15a).

** The Third Circuit's decision that S&A benefits can never be terminated because of an employee's strike activity similarly penalizes Wiegand since the Third Circuit applied its rule retroactively even though the Board never had adopted such a rule and continues to follow a different rule. *See Walter Motor Truck Co.*, 256 NLRB No. 166 (July 1, 1981).

Conclusion

This case raises substantial issues of federal labor law, administrative procedure and fundamental fairness that the Court should resolve. The petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should therefore be granted.

Dated: New York, New York
November 2, 1981

Respectfully submitted,

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Appendix

No. 81-A-203

81-841

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IN THE

Supreme Court of the United States

October Term, 1981

E. L. WIEGAND DIVISION,
EMERSON ELECTRIC CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) LOCAL 1020,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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APPENDIX
TO PETITION FOR A WRIT OF CERTIORARI

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[Corrected Copy]

Opinion of the United States Court of Appeals for the Third Circuit, Dated April 13, 1981

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NOS. 79-2836 and 80-1399

E. L. WIEGAND DIVISION,
EMERSON ELECTRIC COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (UAW), LOCAL 1020,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
(Board Case No. 6-CA-10781)

Argued November 7, 1980

Before: ADAMS, SLOVITER, *Circuit Judges*, and BROTMAN, *District Judge**
(Opinion filed April 13, 1981)

* Hon. Stanley S. Brotman, United States District Court Judge for the District of New Jersey, sitting by designation.

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SLOVITER, *Circuit Judge*

I.

This matter is before us on cross-petitions for review filed by the Union and employer and the NLRB's cross-application for enforcement. It arises from the employer's action in terminating payment of sickness and accident (hereafter "S and A") benefits to disabled employees during a strike by the bargaining unit of which they were members. The National Labor Relations Board found that the employer's action constituted an unfair labor practice and ordered that the employer make such retroactive payments to each employee disabled as of the beginning of the strike for the period until that employee actively participated in strike activity or showed public support for the strike. We find substantial evidence in the record to support the finding of the Board that the employer committed an unfair labor practice in terminating S and A benefits to employees when the strike began. We cannot, however, approve the Board's order insofar as it permits payments to be halted to disabled employees on the basis of public support of the strike, and to that extent grant review and modify the Board's order.

II.

On October 31, 1977 the collective bargaining agreement between Local 1020 of the UAW (the Union) and the E. L. Wiegand Division, Emerson Electric Company ("the employer" or Wiegand) expired. As of that date, 23 of the unit's approximately 1100 employees were receiving S and A payments from the employer under a plan established by

the 1971-1974 and the 1974-1977 collective bargaining agreements.[1] The plan provided for payments by the employer to disabled hourly employees of sixty percent of the employee's average weekly wages for up to thirty-nine weeks of disability, the length of time of such payments dependent on seniority. "Disability" was defined by reference to a written benefits policy as meaning that the employee is "prevented, solely because of injury or disease from engaging in his regular or customary occupation and is performing no work of any kind for compensation. . . ."

Negotiations begun in the fall of 1977 were unsuccessful, and the Union called a strike to commence on November 1. During a negotiation session on the afternoon of October 31, the Union requested that the employer continue to pay premiums for hospitalization, insurance and major medical on behalf of striking union members, with the understanding that the Union would reimburse the employer for those premiums. That evening, in the final bargaining session, the employer proposed that it pay and be reimbursed for these premiums and for continued S and A payments to employees then on sick leave. The S and A payments had not previously been raised in the negotiations. The Union asserted that employees on sick leave were not participants in a strike and that the employer had a legal obligation to continue making such payments. The employer responded that S and A payments would be halted "if [the Union] went out on strike."

On November 1, 1980 the Union went out on strike and the employer immediately halted all disability payments.

1. The Board and the parties refer to 23 employees receiving Sickness and Accident (S and A) benefits. The ALJ referred to 22 employees. The exact number can be determined at the compliance proceedings.

The strike was 100% effective. During the strike's four month duration, the circumstances with respect to the 23 disabled employees varied. Several of the disabled employees contacted the employer to inform it that they were still disabled and not participating in the strike. Seven of the disabled employees sent medical certification to the employer that they were recovered and able to return to work. At least one of those employees obtained certification of his ability to return to work and later was seen on the picket line. Other employees who were disabled as of October 31, 1977 but able to work at the conclusion of the strike were identified as on the picket line or otherwise engaged in strike activity.[2] At least one employee was in the hospital before the strike began and remained there for a substantial time after the strike ended.

After the disabled employees were without S and A payments for six weeks, the Union modified its policy not to pay strike assistance to employees on sick leave. It announced that it would extend strike assistance to them to alleviate the hardship caused by the employer's action in terminating benefits, contingent on reimbursement by the employees from any later Board award against Wiegand. The Union then filed charges with the Board, and the General Counsel of the Board filed the complaint which led to these proceedings.

The strike continued until February 28, 1978. As part of the strike settlement, the parties agreed that "all pending grievances, charges, civil and/or criminal proceedings arising out of or in relation to actions taken or occurring

2. On the record before us we cannot determine which of such participants in the strike were still medically disabled at the time of their strike activity. The parties in these cross-petitions are agreed that such employees will be identified in the compliance phase of these proceedings.

during the strike . . . shall be withdrawn with prejudice or the parties shall cause them to be so withdrawn." When the strikers returned to work, the employer resumed payment of S and A benefits to those employees who were still disabled.

The administrative law judge concluded that the employer committed an unfair labor practice within the meaning of sections 8(a)(1) and (3) of the Act by withholding payments of S and A benefits from disabled employees. The administrative law judge reasoned that these disabled employees were not in a position to choose to withhold labor on the day the strike began; only when they were again able to work did they have the choice and could they become strikers. Each disabled employee was therefore entitled to S and A payments from the date on which the strike began to the date on which he or she was well enough to return to work. The administrative law judge also refused to dismiss the complaint notwithstanding the provision in the strike settlement agreement stipulating that all grievances, charges, and proceedings would be withdrawn. He relied on section 10(a) of the Act and cases interpreting it which held that the parties cannot divest the Board of jurisdiction over unfair labor practices by private agreements.

The Board affirmed the rulings, findings and conclusions of the administrative law judge and adopted his recommendations except with regard to the remedy ordered. The Board stated that, "For all practical purposes, any employee, disabled or sound, who affirmatively demonstrates his support of the strike by picketing or otherwise showing public support for the strike, has enmeshed himself in the ongoing strike activity to such an extent as to terminate his right to continued disability benefits." 246 N.L.R.B. No.

162, slip op. at 4, 103 L.R.R.M. 1073, 1074, [1979-80] N.L.R.B. Dec. (CCH) ¶ 16,619 at 31,033 (1979). Therefore, the Board determined that payments should end either on the date on which an employee was well enough to work, or when the employee had actively participated in strike activity or shown public support for the strike, whichever was earlier.

The employer petitions for review and contends that the Board erred in refusing to dismiss the complaint, that the Board lacked substantial evidence for its finding of an unfair labor practice, and that it abused its discretion in overruling a prior decision with retroactive effect. The Union petitions for review on the ground that the Board improperly declined to order payments for the periods after employees showed public support for the strike but before they were well enough to work. The Board requests enforcement.

III.

As an initial matter we must consider whether the Board properly denied the employer's motion to dismiss the unfair labor practice charges on the basis of the strike settlement agreement in which the Union agreed to the withdrawal of all charges relating to the strike. Assuming arguendo that the employer correctly construes the agreement, its operation is subject to section 10(a) of the National Labor Relations Act which provides that the Board's power to remedy unfair labor practices shall not be affected "by any other means of adjustment . . . that has been or may be established by agreement, law, or otherwise . . . ." 29 U.S.C. § 160(a) (1976).

By well established principle, private contracts may not be used to legitimate unfair labor practices nor to divest the Board of jurisdiction over such practices. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967); *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944). In *J. I. Case Co.*, the Supreme Court affirmed that the Board acts as a public body charged in the public interest with the duty of preventing unfair labor practices, and stated, "[w]herever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility." *Id.* at 337. In *International Union of Electrical, Radio and Machine Workers, Local 613 v. NLRB*, 328 F.2d 723 (3d Cir. 1964), this court rejected the company's argument that a term in its post-strike collective bargaining agreement restricted the Board's power to enter prospective relief only and divested it of power to enter an order of reinstatement with back pay. We held that the power of reinstatement with back pay was exercised in vindication of the public policy encompassed by the Act, and thus "the rights of discriminatorily discharged employees under the statute are not subject to private adjustment. Such an adjustment, if made, cannot bar the Board's exercise of its statutory authority." *Id.* at 727. *See also Lodge 743, International Association of Machinists v. United Aircraft Corp.*, 337 F.2d 5, 8-9 (2d Cir. 1964), *cert. denied*, 380 U.S. 908 (1965).

The policy reflected in the precedent and expressed in section 10(a) prevents a party from engaging in unfair labor practices that may coerce a favorable labor agreement and then insulating itself from Board sanctions by exculpatory provisions in that agreement. The Board properly refused to dismiss the complaint and proceeded to the merits, as we also do.

IV.

The first issue on the merits of this appeal is whether substantial evidence supports the Board's conclusion that the employer, Wiegand, committed an unfair labor practice. The Board's conclusion that an unfair labor practice occurred is based on two findings. First, it found that the disability payments were accrued benefits rather than current wages. Second, it found that these benefits were cut off by Wiegand with the intention of coercing and restraining protected union activity with respect to the strike through the imposition of a sanction against certain employees if other employees engaged in strike activity.

The parties agree that these findings, if correct, would support a conclusion that an unfair labor practice was committed. The Supreme Court held in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), that a refusal to pay accrued vacation benefits to those participating in an economic strike was an unfair labor practice, even absent proof of an improper motivation by the employer. The Court found two principles controlling:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the em-

> ployer engaged in discriminatory conduct which could have adversely affected employees rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

Id. at 34 (emphasis in original).

The Supreme Court had held earlier in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), that the Board might properly infer the existence of discriminatory motivation or improper intent without evidence of illegal subjective intent. Where the employer has engaged in conduct that is "inherently discriminatory or destructive" by its very nature, the employer must be held to intend the consequences which foreseeably and inescapably flow from it. *Id.* at 228. The employer may offer evidence of proper motivation, but it must prove a business purpose of overriding significance. *Id.* at 231. In *Erie Resistor*, the Court found that a grant of additional seniority (super-seniority) to employees working through a strike could not be justified as necessary to continued operation during the strike.

Although acknowledging these legal principles, the employer argues that the S and A benefits at issue here are wages rather than accrued benefits, and that the record cannot support a conclusion of antiunion motivation. Our standard of review is whether the Board's findings are supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). As the Court has frequently noted, the Board has been delegated the function of balancing the conflicting interests of employer and employees, subject to limited judicial review. *NLRB v. Erie Resistor Corp., supra*, 373 U.S. at 236.

A.

The relevant precedents establish the posts between which this issue falls. On one side, as the employer argues, it is not required to finance a strike against itself by paying wages or other similar expenses. *General Electric Co.*, 80 N.L.R.B. 510 (1948) (wages); *Towne Chevrolet*, 230 N.L.R.B. 479 (1977) (insurance policy premiums); *Ace Tank and Heater Co.*, 167 N.L.R.B. 663 (1967) (medical insurance premiums). On the other side, an employer may not withhold payment of already earned or accrued benefits contingent upon the cessation by employees of a legitimate economic strike. This situation has arisen most frequently in the context of accrued vacation benefits. *See NLRB v. Great Dane Trailers, Inc., supra*, 388 U.S. at 32; *Allied Industrial Workers, Local 289 v. NLRB*, 476 F.2d 868, 875-876, 878 (D.C. Cir. 1973); *NLRB v. Jemco, Inc.*, 465 F.2d 1148 (6th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); *NLRB v. Frick Co.*, 397 F.2d 956 (3d Cir. 1968). *Accord, Indiana & Michigan Electric Co.*, 236 N.L.R.B. 986 (1978) (employer unlawfully withheld accumulated leave pay until employee ceased strike), *enforced without opinion*, 610 F.2d 812 (4th Cir. 1979).

In determining whether the S and A benefits in question fall most closely to one side or the other, the Board adopted the findings and conclusions of the ALJ that:

> the benefits being paid the sick people were not compensation for contemporaneous delivery of services at all, but rather payment for past work performed. Their entitlement to that money depended not one wit upon their working at that time. That it was deferred payment for work—albeit conditional upon their being sick and disabled—is true, but for work performed by

them in the past, not in the present. Indeed, this is why the man who worked 30 years received more weeks of S and A benefits while sick than the man who had only performed as an employee a year, or two, or three. If the sick man must come out of the hospital and work during a strike to receive a benefit he sweated for in prior years, must the retiree, who is collecting the pension he earned over 35 years, also come back, merely because the working complement is striking at the moment? To ask the question is to answer it.

Accrued benefits, in contrast to wages, are deferred compensation for work already done. They may take the forms of wages due for past work, vacation time, seniority rights and other conditions of employment linked to past service. *E.g., NLRB v. Darling & Co.,* 420 F.2d 63 (7th Cir. 1970), *enforcing* 170 N.L.R.B. 1068 (1968) (severance pay); *Swift Service Stores, Inc.,* 169 N.L.R.B. 359 (1968) (Christmas bonus). Such benefits may be defeasible; for example, vacation time may be forfeited if not taken within a calendar year. The test in deciding if benefits have accrued is whether they are due payable on the date on which the employer denied them. *Allied Industrial Workers, Local 289 v. NLRB, supra,* 476 F.2d at 876.

The S and A benefits in this case have the distinguishing characteristic of accrued benefits. As the ALJ and the Board found, the right to and the total amount of benefits are tied to the duration of past services and the wages paid for them. Although they are conditional on the employee suffering and continuing to suffer a disabling illness or injury, they do not depend on any return to work or on any future services to the employer.

Wiegand contends that the continued payment of benefits is conditional also on no strike occurring because the applicable benefit plan defines disability as the condition of being unable to work "solely because of" illness or injury. It argues that here the employees would not have worked during the strike because they were union members and because the strike was fully effective. Since they were not absent from their jobs solely because of physical disability, it claims they are not entitled to benefits.

We agree with the Board that the employer's reading of the disability definition is not tenable. The plan defines disability in terms of the employee being prevented from engaging in his or her "regular and customary occupation" because of illness or injury. This definition turns on the physical capacity to carry on one's occupation. Nor can we accept the employer's suggestion that payment of S and A benefits is dependent upon the availability of work for that particular employee. It has pointed to no language limiting the right to benefits in such a way.

In short, nothing in the record of this case indicates that the benefit plan contemplated that employees who were incapable of performing their usual occupations for the employer would not be deemed disabled for the purposes of receiving benefits. Rather, if an employee is certified as disabled, the only relevant consideration within the period for which benefits are due is whether the employee has again become able to work. Therefore, we find substantial basis supporting the Board's conclusion that the S and A benefits were accrued benefits and not wages, and were due and payable within the period of the strike.

B.

Wiegand contends that the Board had no basis for its conclusion that Wiegand intended to coerce and restrain protected activity by its termination of the S and A benefits. Pointing to evidence of its announced reliance on *Southwestern Electric Power Co.*, 216 N.L.R.B. 522 (1975), Wiegand claims that its action can only be construed as properly undertaken in good faith reliance on the advice of its counsel.

Under *NLRB v. Erie Resistor Corp., supra,* an intent to encroach upon protected rights may be found when discriminatory consequences foreseeably flow from an action; it is unnecessary to show specific illegal intent. Similarly, the test of coercion or interference with protected rights under Section 8(a)(1) is whether the action undertaken by the employer reasonably tends to restrain or interfere with the employee's exercise of those rights. *NLRB v. Clearfield Cheese Co.*, 322 F.2d 89, 94 (3d Cir. 1963). Under *NLRB v. Great Dane Trailers, Inc., supra,* the Board may find the necessary intent even if the employer shows its conduct had a proper motivation, so long as the impact of the discrimination by the employer is "inherently destructive" of section 7 rights. Only when the adverse effect is "comparatively slight" must antiunion motivation be proven as a separate element of the unfair labor practice if the employer raises the issue.

Where, as here, the employer's action affected a benefit that could amount to as much as 45% of an employee's annual income, one might argue that it is so destructive of important rights that subjective intent could be deemed irrelevant. However, we need not decide the issue of intent on that basis because the Board has specifically found anti-

union motivation in this case, finding that "[Wiegand's] announcement of the termination of these benefits was intended to coerce and restrain the protected union activity with respect to the strike by imposing a sanction against certain unit employees if others in the unit engaged in strike activity." 246 N.L.R.B. No. 162, slip op. at 2, 103 L.R.R.M. at 1073. The Board expressly relied on Wiegand's "declaration that these benefits would not be paid to employees who would otherwise receive them came at a time when a strike at its facility was imminent, but before there was any showing of how widespread the strike would be, and before [Wiegand] was aware that any of the employees who were unable to work ratified or actively supported the strike." *Id.* The Board also relied on the fact that "[Wiegand] terminated these benefits immediately upon the commencement of the strike despite a union representative's clear protest that the individuals who were unable to work were not participants in any strike."[3] *Id.* The context of the employer's decision as conveyed in the final negotiation session adequately supports the Board's conclusion that antiunion motivation was present.

Although Wiegand introduced evidence of its having proceeded on the basis of legal precedent for its actions, this evidence does not invalidate the inference drawn by the Board. Such evidence is self-serving and may be weighed together with all other evidence by the Board. As this court has said in the context of unlawful discharge cases,

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3. The record also includes evidence that Wiegand attempted to use its threatened cutting off of disability benefits to secure concessions from the union on the conduct of the strike, and itself brought up the question of these benefits at the last bargaining session without any earlier indication of its position that these were not in fact accrued benefits. Appendix at 91-92, 200-05.

> [t]here is clearly no obligation on the Board to accept at face value the reason advanced by the employer. The concurrent existence of an otherwise valid reason for the discharge of an employee does not preclude a factual determination that his discharge was discriminatory if it appears from a preponderance of evidence, and the reasonable inferences drawn therefrom, that the discharge was in fact motivated by the employer's opposition to the employee's union activities.

NLRB v. Buitoni Foods Corp., 298 F.2d 169, 174 (3d Cir. 1962). *Accord, NLRB v. G & J Co.*, 346 F.2d 960 (3d Cir. 1965). *See also NLRB v. Garry Manufacturing Co.*, 630 F.2d 934, 945 (3d Cir. 1980) (In spite of a concurrent permissible justification, an action is an unfair labor practice if it is partly motivated by reaction to the employee's protected activity); *Edgewood Nursing Center, Inc. v. NLRB*, 581 F.2d 363, 368 (3d Cir. 1978). This is equally applicable where an employer offers a rationale for other discriminatory action. Therefore, even if Wiegand might properly have relied on *Southwestern Electric* to immunize its action, a question we consider hereafter, the Board might still conclude that Wiegand did not in fact do so. We find substantial evidence to support the Board's conclusion that Wiegand intended to coerce and restrain protected activity.

V.

Wiegand vigorously asserts that the Board acted improperly in retroactively changing its rule in *Southwestern Electric Power Co.*, 216 N.L.R.B. 522 (1975). In its decision in this case, the Board expressly overruled *Southwestern Electric* to the extent it was inconsistent with the result in this case. While we believe that under the circumstances of this case, application of the NLRB's new

approach would not be arbitrary or capricious, we also believe that Wiegand misperceives both the relevance and the effect of the Board's reference to *Southwestern Electric* in the decision here.

In *Southwestern Electric* the Board, acting through a three member panel, held that "on the basis of the facts presented, [the employer] did not violate the Act by treating as strikers the six unit employees on sick leave at the beginning of the strike." *Id* at 522. The decision, by a 2 to 1 vote, was based on the reasoning that the employer had no way of knowing for certain that the employees on sick leave, all of whom were members of the Union, did not support the strike activities of their colleagues. Since the Board agreed with the ALJ that the employer's belief that the employees in question ratified and supported the strike was reasonable, the complaint against the employer was dismissed. The Board expressly rejected a claim that cancellation of sick leave benefits represented discrimination against union members, saying that there was "no basis" in the case upon which to predicate such a finding. Member Fanning, then Acting Chairman, dissented on the ground that the majority opinion would require that employees on sick leave disavow legal strike action in order to receive their sick pay, which would constitute a clear violation of the section 7 rights of the employees.[4]

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4. Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in § 158(a)(3) [section 8] of this title."

29 U.S.C. § 157 (1976).

In the present case the Board, by a 3 to 1 majority on this issue, took the opportunity to express its agreement with Chairman Fanning's dissenting opinion in *Southwestern Electric* that the employees had a section 7 right to refrain from declaring their position on a strike while they were medically excused. 216 N.L.R.B. at 523. The Board here stated, "an employer may no longer require its disabled employees to disavow strike action during their sick leave in order to receive disability benefits. To allow the termination of such benefits to certain employees as a result solely of the strike activities of others is to penalize the employees who have not yet acted in support of the strike." 246 N.L.R.B. No. 162, slip op. at 3, 103 L.R.R.M. at 1073. One member of the Board dissented, expressing his adherence to the analysis in *Southwestern Electric*.

Retroactive application of newly adopted administrative rules or interpretations is not *per se* arbitrary. Instead, "retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). *See also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974). In essence, the courts analyze whether the inequity of retroactive applications is counterbalanced by sufficiently significant statutory interests.[5] *See, e.g., Retail, Wholesale and Department*

5. In *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972), the court enumerated the following factors to be considered in resolving the problem of retroactive application of a Board holding: (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely occupies a void in an unsettled area of law, (3) the extent to which the party against whom the new holding is applied in fact relied on the former rule, (4) the degree of the burden imposed, and (5) the statutory interest in application of this new rule.

Store Union v. NLRB, 466 F.2d 380 (D.C.Cir. 1972); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966).

In this case, even were the Board's order requiring payment of S and A benefits to those employees disabled during the strike to be considered as a retroactive application of a changed interpretation, we would not find its impact to be inequitable. The employer is merely being required to pay an accrued benefit, a form of deferred compensation for service it has already received. The effect therefore does no more than prevent unjust enrichment to an employer by its retention of benefits due to its employees.

Another apparent difference between this case and the decision in *Southwestern Electric* is the nature of the benefit that was denied. In that case, the "sick pay" consisted of "wages being paid to six employees pursuant to a wage continuation policy whereby employees who are sick and unable to work continue to receive, for specified periods and under certain conditions, the wages they would have earned had they been working." 216 N.L.R.B. at 524 (Decision of the ALJ). Therefore, the issue was whether discontinuance of benefits comparable to wages during a strike constituted an unfair labor practice. There was no indication in *Southwestern Electric* that the sick pay was an accrued benefit. In this case, we have already decided that the benefits discontinued fall into the category of accrued benefits. Therefore, the employer had no more right to discontinue such benefits than it would have had to deny strikers their accrued vacation time.

The ALJ recognized the distinction between the case before him and that presented in *Southwestern Electric*. He found this case more analogous to the Board's decision in *Indiana & Michigan Electric Co.*, 236 N.L.R.B. 986 (1978),

enforced without opinion, 610 F.2d 812 (4th Cir. 1979), where the Board found the employer committed an unfair labor practice by withholding leave pay due employees on the basis of work previously performed. Thus the ALJ here stated that the "employees named in this complaint had already earned their S and A benefits before the strike started."

The fact that the Board has chosen this case as the vehicle for repudiating its prior interpretation in *Southwestern Electric* cannot give the employer any basis for complaint. This case is distinguishable on its facts because of the finding by the Board of intent by the employer to coerce or restrain protected activity, a finding not made in *Southwestern Electric*.[6] The difference is illustrated by the Board's decision in *Pease Co.*, 237 N.L.R.B. 1273 (1978). There the Board found that an employer committed an unfair labor practice when it halted disability benefits notwithstanding the employee's protest of termination of benefits statement that he was not participating in the strike. The Board held that because of these facts, the case was not governed by *Southwestern Electric*, which involved the *reasonable* belief of an employer. In light of the foregoing differences the Board was justified in rejecting Wiegand's defense of good faith reliance on *Southwestern Electric*.

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6. As the Board and the Union argue, the employer here had significantly different information when it announced its decision to terminate S and A benefits than the employer had in *Southwestern Electric*. This employer had received an explicit statement before the strike that employees on sick leave were not strike participants. After the termination, the employer received protests from at least some of the disabled employees who stated they were not on strike, precisely the evidence that the Board noted was absent in *Southwestern Electric*.

VI.

Having concluded that the Board was warranted in finding that Wiegand had committed an unfair labor practice and in requiring Wiegand to pay S and A benefits to the disabled employees, we must still decide whether there is any basis for the Board's decision that such benefits can be withheld for the periods after the employees actively participated in strike activity or showed public support. We conclude that this limitation cannot be supported.

The Board justified its order that no payment of S and A benefits shall be due for the periods subsequent to any employee's active participation in strike activity or public support for such activity on the ground that such affirmative demonstration of support "enmeshed" an employee "in the ongoing strike activity to such an extent as to terminate his right to continued disability benefits." 246 N.L.R.B. No. 162, slip op. at 4, 103 L.R.R.M. at 1074. It concluded that its limited remedy represented a fair accommodation between employees' rights to disability benefits without disavowing the strike and the employer's right to refuse to finance a strike against itself.

Member Jenkins dissented from the Board's failure to order the full payment of all S and A benefits during their disability period. He stated that only the employee's recovery would terminate the employer's "fully vested obligation to continue [S and A] payments for all employees on disability prior to the strike", *id.* at 7, 103 L.R.R.M. at 1074; that disabled employees are inherently unable voluntarily to withhold services from the employer in support of a labor dispute; and that the employer's prior commission of an unfair labor practice in terminating the benefits may

have caused, and therefore excuses, the strike participation of the disabled employees.

Both petitioners attack the remedy ordered by the Board. We have already rejected Wiegand's contention that no S and A payments are proper. The Union, however, asserts that the Board's findings that these benefits were accrued, that disabled employees had non-striker status, and that employees have a section 7 right to refrain from strike action while disabled are inconsistent with the Board's determination that S and A benefits may be cut off by a showing of strike support. It argues that benefits should be continued until employees are no longer eligible or are no longer physically disabled.

Our review of the Board's choice of remedy is necessarily limited by deference to its administrative competence in deciding what means best serve the purposes of the NLRA. Under section 10(c) of the Act, 29 U.S.C. § 160(c) (1976), the Board, upon finding that a person has committed an unfair labor practice, shall require such person to cease and desist from its unfair labor practice and to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act. . . ." However, it is patent that the Board's remedy cannot be inconsistent with the reasoning of the decision itself, or with its still applicable principles enunciated in other cases. If it is, then its choice of the remedy may not be enforced. As we have recently said, "[i]t is our duty to insure that the Board adheres to its established criteria unless it clearly decides to modify or alter those standards." *NLRB v. Pincus Bros., Inc.—Maxwell*, 620 F.2d 367, 372 (3d Cir. 1980).

The Board asserts that its remedy serves the well established policy of protecting an employer from financing a strike against itself. *E.g., General Electric Co.*, 80 N.L.R.B. 510 (1948). However, the entire basis of the Board's decision was that the S and A payments were to be considered as accrued benefits. Since an employer may not deny a striking employee accrued benefits, such as vacation pay, because of his or her active participation in a strike, it follows that the employer may not deny the S and A benefits merely because of the disabled employee's approval of or participation in strike activity. The Board's reliance on its decision in *Abilities & Goodwill, Inc.*, 241 N.L.R..B No. 5, 100 L.R.R.M. 1470, *enforcement denied on other grounds*, 612 F.2d 6 (1st Cir. 1979), is unpersuasive. In that case the Board held that an employer may avoid back pay liability by showing that the employee would not have accepted a reinstatement offer or is otherwise willfully withholding his or her services. Back pay is distinguishable from accrued benefits. Back pay is a statutory remedy that shifts the risk of loss of wages from the employee to the employer if it has committed an unfair labor practice, generally an unlawful discharge. It cannot be analogized to accrued benefits which are payments for services the employer has already received. Even though such benefits, whether disability payments, vacation pay, or previously earned wages, may provide the living expenses of those who oppose the employer, they do not represent unfair strike financing by an employer, and the Board may not justify its order on that basis.

Moreover, the Board's decision contravenes the reasoning it applied in *Abilities & Goodwill, Inc., supra*, where it refused to limit the remedy to an employee who, after being illegally discharged, engaged in strike activity. The Board

was unwilling to presume the absence of a connection between the employee's conduct and the unfair labor practice. There, the Board stated, "[B]ecause the uncertainty [of the motives of the striker] is caused by the employer's unlawful conduct, we will not indulge in the presumption that the discharge itself played no part in keeping the employees out of work. Rather, it seems to us more equitable to resolve the ambiguity against the wrongdoer . . . ." 241 N.L.R.B. No. 5, slip op. at 5, 100 L.R.R.M. at 1471. Here where the employer's termination of the S and A benefits was found to be an unfair labor practice, it follows that such unlawful conduct may have induced strike participation and the employer should not be allowed to benefit from a presumption that its conduct did not induce the participation. *See International Union of Electrical, Radio and Machine Workers Local 613 v. NLRB,* 328 F.2d 723, 726 (3d Cir. 1964) (Where employer commits an unfair labor practice during an economic strike, it may be required to give back pay for the time the strike was prolonged).

Furthermore, the Board's order in this case is inconsistent with its holding, still viable, that an employee who pickets during off-duty time cannot be regarded as a "striker" against whom an employer can act. *See M Restaurants, Inc.,* 223 N.L.R.B. 725 (1976); *Shoppers Drug Mart, Inc.,* 226 N.L.R.B. 901, 910 (1976); *Edir, Inc.,* 159 N.L.R.B. 686 (1966). *See also NLRB v. Circle Bindery, Inc.,* 536 F.2d 447 (1st Cir. 1976) (boycott support); *Coors Container Co.,* 238 N.L.R.B. 1312, 1319 (1978) (display of boycott signs on vehicle); *Sears, Roebuck & Co.,* 168 N.L.R.B. 955, 956-57 (1967) (boycott leafletting after hours). So long as the employee meets the work commitment to the employer, the employer cannot act against the employee for his or her off-time actions, or section 7 rights would be merely empty promises.

Obviously, the employer need not continue to pay S and A benefits once the employee is no longer disabled. Active participation in strike activity may be telling, or even presumptive, evidence of cessation of disability. However, whether such activity in fact reflects the end of the disability period may depend on the nature of the activity and the physical demands of the particular employee's job. Such details can be resolved in the compliance proceeding. On the other hand, use of the mere expression of public support for the strike by a disabled employee, such as one still in the hospital, as the basis for termination of benefits is inherently destructive of the employee's section 7 rights.

Accordingly, the Board's decision to end benefits on the basis of active participation or public support for strike activity cannot stand. It is internally inconsistent with the Board's own rationale in this case. It varies from the Board's policies as set out in previous Board decisions, and frustrates effectuation of section 7 rights.

VII.

We have found that the Board properly concluded that Wiegand had committed an unfair labor practice and ordered payments of sickness and accident benefits, but improperly limited those payments. Accordingly, we will grant review and enter a decree modifying the order of the Board to authorize payment of sickness and accident benefits for the maximum period of each disabled employee's eligibility or for such employee's period of disability as defined in the plan, whichever is shorter. As so modified, we will enforce the order of the Board pursuant to our power under section 10(f), U.S.C. § 160(f) (1976).

ADAMS, *Circuit Judge*, concurring.

I concur in the judgment of the Court because I believe there is sufficient evidence to support the conclusion of the National Labor Relations Board that the sickness and accident benefits (S&A benefits) were accrued and that Wiegand committed an unfair labor practice when it terminated these benefits. Under the circumscribed scope of judicial review of Board orders, we may not substitute our judgement for that of the agency; rather, we are constrained to uphold findings supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

Although I agree with the reasons expressed by the majority for upholding the Board's findings on the accrued nature of the benefits, I write separately to emphasize a finding that in my view is crucial to the resolution of several issues in this case. Significantly, the Administrative Law Judge and the Board found that the employer intentionally terminated sickness and accident benefits for the purpose of coercing and restraining the employees' protected right to engage in concerted activity.

Substantial facts support this finding of intentionally coercive anti-union animus. As the Board recounted the chronology of events, the employer declared that it would cease paying S&A benefits in direct response to a strike call by the union. The union promptly protested this decision, and informed the employer that the disabled workers were not strike participants. Despite these protestations, Wiegand persisted in cutting off the S&A benefits. The employer acted before it could have acquired any knowledge of how effective the future strike would be or whether the sick employees would ratify the strike. Under these circumstances the ALJ and the Board could have reasonably

found that the employer's announcement amounted to a retaliatory threat to sanction certain workers if the other employees went on strike.

The import of the finding of coercive intent is that it serves to distinguish the present situation from that involved in *Southwestern Electric Power Co.*, 216 NLRB 522 (1975), a matter in which the Board found that the employer had not committed an unfair labor practice when it ceased paying sick leave after a strike began. Notably absent from *Southwestern Electric* is an indication that the employer threatened to terminate benefits before the strike commenced, or that the eventual cut-off which occurred after the strike was called, was an intentionally coercive measure. Indeed, the focus of the inquiry in *Southwestern Electric* was whether the employer acted reasonably in assuming that all workers, well or disabled, actually supported the strike. In concluding that the employer's belief was reasonable, the Board found it significant that no Southwestern employee had registered a protest over the termination of sick leave payments. 216 NLRB at 522. The contrast with the events in the present case is quite significant. Not only did the Board find that Wiegand's threat to cut off benefits was designed to dissuade the union from striking, but the company adamantly adhered to its position despite indications that some disabled workers were not strikers. The union protested to the company that the sick individuals were not strikers, and the record also shows that at least three workers on disability actually telephoned the company to complain when their benefits stopped coming. These callers specifically told the company that they were not on strike, but their inquiries were met with the answer that the cut-off was a firm company policy. This affirmative indication in the present situation

that the disabled workers were not in the same position as strikers was, as the Board remarked, absent in *Southwestern Electric*. Moreover, there was no finding in *Southwestern*, as there was here, that the sick leave payments were accrued compensation linked to services rendered in the past.

Factual differences between Wiegand's intentionally retaliatory action and the circumstances in *Southwestern Electric* illustrate that, to the extent Wiegand may have based its action on the prior Board precedent, its reliance was not justified. The narrow decision in *Southwestern* cannot fairly be interpreted to give employers carte blanche to issue coercive pre-strike threats to terminate *accrued* benefits. Such a construction would appear to run afoul of the Supreme Court's decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Consequently, the Board's determination to overrule *Southwestern Electric* in the present case has not visited an undue hardship on Wiegand. The employer has not been subjected to fines or other penalties. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974). Rather, it merely has been ordered to pay benefits that it was always obligated to pay, because the workers had earned the right to S&A payments before a strike was imminent.

It is firmly settled by the Supreme Court that the Board may overrule its previous decisions in subsequent adjudicatory proceedings, as cumulative experience and wisdom gleaned from legal and industrial evolution warrant rethinking earlier held views. *See e.g., NLRB v. Weingarten, Inc.*, 420 U.S. 251, 264-67 (1975); *NLRB v. Bell Aerospace Co., supra.* Reliance by one party on past Board decisions does not alter the Board's authority to set aside precedents

and apply the new principle to the case at hand. *Bell Aerospace,* 416 U.S. at 295. Accordingly, Supreme Court decisions compel the conclusion that, in this case, Wiegand cannot be excused from having committed an unfair labor practice on the basis of possible reliance on a previous Board ruling.

I also write separately to highlight why, in this particular proceeding, we may modify the Board's remedial order despite the extensive deference courts normally accord to such orders.

The Supreme Court has often attested to the breadth of the Board's discretion to devise "remedies to effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co.,* 344 U.S. 344, 346 (1953). As the Court explained in *Fibreboard Corp. v. NLRB,* 379 U.S. 203, 216 (1964), "[t]he Board's power is a broad discretionary one, subject to limited judicial review. . . . 'In fashioning remedies to undo the effects of violation of the Act, the Board must draw on enlightenment gained from experience.' *Labor Board v. Seven-Up Bottling Co.,* 344 U.S. 344, 346. The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' *Virginia Elec. & Power Co. v. Labor Board,* 319 U.S. 533, 540." (some citations omitted).

This synthesis reveals that although the Board's remedial authority is extensive, it is confined by the very policies that the Board is charged with implementing. Thus, there are two primary constraints on remedial discretion. First, the remedy selected must "undo the effects of violations of the Act," *id.,* rather than perpetuate the unfair labor practice. Second, the Board is not free to adopt a remedy that is at odds with the purposes of and the rights guaranteed

by the national labor laws. The Board exceeded both limitations in the present case. Here, the policy that the remedy should have effectuated was the right of employees to support a strike without losing accrued benefits. Yet, the Board's order that the employer could discontinue S&A benefits for active strike supporters in and of itself is inconsistent with the protected right of employees to engage in concerted activity in furtherance of collective bargaining efforts. 29 U.S.C. §§ 157, 158(a)(1) (1976). Moreover, rather than redressing the violation, the Board's remedial order permitted the employer to continue the unfair practice of withdrawing accrued benefits from strike supporters. Thus, the remedy adopted by the Board stands in irreconcilable conflict with its underlying finding that the termination of accrued benefits constituted an unfair labor practice.

Having found that S&A benefits are accrued compensation tied to past service, the Board is not free nevertheless to permit the employer to terminate such benefits for those disabled workers who show support for the strike. The right of employees to support legal strike activity without suffering retaliation or discrimination is at the heart of the protection embodied in 29 U.S.C. §§ 157 and 158. *See NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). The Supreme Court has squarely held that an employer may not deny accrued benefits to workers who support a strike. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

The remedial order adopted by the Board, however, leads to the precise result prohibited by the Supreme Court in *Great Dane*: it authorizes the withdrawal of accrued benefits to workers who indicate support for the concerted efforts of fellow employees to withhold their services. Such

an action is likely to inhibit strike support, an effect which is fundamentally contradictory to rights protected by 29 U.S.C. § 157. Because the Board's order patently fails to effectuate the policies of the national labor laws, it is not entitled to the respect which appellate courts usually must grant to remedial choices. The only remedial order consonant with the finding that the S&A benefits were accrued is one that directs the employer to pay these benefits for the entire time a worker remains disabled.

Although I am concerned that an employer should not be placed in the position of financing a strike, the apprehension of the Board that such an order here would be tantamount to requiring Wiegand to finance the strike is not consonant with the finding that the benefits were accrued. An employer can be deemed to be financing a strike against itself only when it must pay compensation that bears the characteristic of wages. Wages are *unaccrued* payments for current services rendered. Since striking employees are withholding current services, the employer need not pay them wages. In contrast, Wiegand's duty to pay the *accrued* disability insurance arises in return for efforts expended by employees in the past. Inasmuch as these benefits are not given in return for current services, the employer's continued payment of S&A benefits to disabled workers, during a strike engaged in by nondisabled workers, cannot fairly be viewed as financing the strike.

Accordingly, I agree with the majority that we should enforce the Board's finding of an unfair labor practice because, under the substantial evidence standard of review, the Board's determination that the S&A benefits were accrued is adequately supported in the record. Once the

Board found the S&A benefits to be accrued, the unfair labor practice finding was mandated by the Supreme Court's holding in *Great Dane Trailers*. Similarly, modification of the remedial order is consistent with Supreme Court precedents.

A TRUE COPY:
TESTE:

Clerk of the United States Court of Appeals
for the Third Circuit

Order, Dated August 3, 1981, Amending Opinion

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 79-2836 and 80-1399

E. L. WIEGAND DIVISION,
EMERSON ELECTRIC COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (UAW), LOCAL 1020,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
(Board Case No. 6-CA-10781)

Argued November 7, 1980

Before: ADAMS, SLOVITER, *Circuit Judges*, and BROTMAN, *District Judge**
(Opinion filed April 13, 1981)

* Hon. Stanley S. Brotman, United States District Court Judge for the District of New Jersey, sitting by designation.

It is ordered that the slip opinion in the above-captioned case be and is hereby amended as follows:

The second sentence of the first paragraph of page 12 shall be amended to read: "The ALJ and the Board found that the length of the period of payments of benefits is tied to the employee's length of service.[2a]"

The following footnote 2a shall be added:

> 2a. The ALJ, in finding the S and A benefits were accrued as being "deferred payment for work . . . performed by [employees] in the past", also stated "this is why the man who worked 30 years received more weeks of S and A benefits while sick than the man who had only performed as an employee a year, or two, or three." A7. All of the findings were adopted by the Board. A29. The one Board member who dissented from the Board's result disagreed only with the Board's failure to order the full remedy recommended by the ALJ. In his separate dissenting opinion, member Jenkins specifically referred to the accrued nature of the S and A benefits, and stated "Respondent's disability plan operates as a form of self-insurance whereby employees, who as a result of sickness or accident are unable to work, are provided with 60 percent of their income for periods ranging from 1 to 39 weeks, depending on their seniority. As the extent of this benefit is directly a function of employee seniority, it is apparent that the benefit is a form of compensation for past services and is fully vested upon the commencement of the employee's actual disability." A35.
>
> In its brief in this court, the employer, while arguing that the A and S benefits were not deferred payments, nevertheless stated, "Contrary to the ALJ (7), *seniority measures only the length of an employee's A & S benefits,* if he has the right to receive them." Wie-

gand's brief, p. 31 (emphasis added), thus conceding the nexus between the length of the benefits and the past services.

The language in the first sentence of the first paragraph on page 18 shall be amended to read: ". . . even were the Board's order requiring payment of S and A benefits to those employees whose disability continued during the strike. . . ."

Dolores K. Sloviter

Circuit Judge

Dated: August 3, 1981

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Refusal to Issue Complaint, Region 6 Regional Director, National Labor Relations Board

[LETTERHEAD OF]

NATIONAL LABOR RELATIONS BOARD

REGION 6

10th Floor, Porter Building, 601 Grant Street

Pittsburgh, Pennsylvania 15219

Telephone (412) 644-2977

February 15, 1978

Re: E. L. Wiegand, Division
Emerson Electric Co.
Case No. 6-CA-10781

E. Donald Ladov, Esquire
Baskin, Boreman, Wilner
Sachs, Gondelman & Craig
10th Floor Frick Building
Pittsburgh, Pa. 15219

Dear Mr. Ladov:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge are warranted inasmuch as there is insufficient evidence of violation. More specifically, the investigation disclosed that the Employer following the expiration of its collective bargaining agreement with the

Union on October 31, 1977 has discontinued weekly indemnity payments since the commencement of an economic strike by the Union on November 2, 1977 to employees who were, at the time the strike began on medical leave. The Employer, who is its own insurer, made these payments from an Employer-established trust fund to which it alone makes contribution. There is no evidence that these benefits are the kind of benefits which the employees affected could be said to have accrued prior to the strike. Instead, it would appear that these benefits do not extend beyond the term of the expired collective-bargaining agreement and are, in essence, a substitute for wages the employees would be receiving if they were working. *Southwestern Electric Power Company,* 216 NLRB 522 (1975). It is well established that striking employees are not entitled to wages and, therefore, I do not find the Employer's refusal to continue payment to the employees on sick leave in this situation violates the Act. *Southwestern Electric Power Company, supra.*

In regard to the alleged disavowal of the strike by several of the employees on medical leave, Union has no official evidence that any of the employees on medical leave would have crossed the Union's picket line and returned to work had they been able to do so on the date the strike began or at any time thereafter. Under these circumstances, I am unable to conclude that any of the employees involved herein effectively disavowed the Union's strike. *Southwestern Electric Power Company, supra.* Accordingly, for the reasons set forth above, I am, refusing to issue a complaint in this matter.

Please note the attachment setting forth the procedure for filing an appeal.

Very truly yours,

/s/ HENRY SHORE

Henry Shore
Regional Director

Enc.
CERTIFIED MAIL—RETURN
RECEIPT REQUESTED

cc:
John S. Irving, General Counsel
National Labor Relations Board
Washington, D. C. 20570

Eugene T. D'Ablemont, Esquire
Kelley, Dryer & Warren
350 Park Avenue
New York, N. Y. 10022

E. L. Wiegand, Division
Emerson Electric Co.
7500 Thomas Boulevard
Pittsburgh, Pa. 15206

General Counsel's Decision on Appeal of Refusal to Issue Complaint

[LETTERHEAD OF]

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570 August 10, 1978

Re: E.L. Wiegand, Division of Emerson Electric Company
Case No. 6-CA-10781

E. Donald Ladov, Esquire
Baskin, Boreman, Wilner, Sachs,
Gondelman & Craig
10th Floor, Frick Building
Pittsburgh, Pennsylvania 15219

Dear Mr. Ladov:

Your appeal from the Regional Director's refusal to issue complaint in the above-captioned case has been duly considered.

The appeal is sustained. It was concluded that the Employer's discontinuance of accident and sick benefits to employees, who were receiving such prior to the expiration of the collective bargaining agreement and the commencement of a lawful economic strike, raised issues warranting Board determination based on record testimony developed at a hearing before an Administrative Law Judge.

Accordingly, this case is remanded to the Regional Director with instructions to issue an appropriate Section 8(a)(1)

and (3) complaint, absent settlement. All further inquiries should be addressed to the Regional Director.

Very truly yours,

John S. Irving
General Counsel

By /s/ RONALD M. SLATKIN

Ronald M. Slatkin
Acting Director
Office of Appeals

Re: Case No. 6-CA-10781

cc: Director, Region 6
Eugene T. D'Ablemont, Esquire, Kelley, Drye & Warren, 350 Park Avenue, New York, New York 10022
E.L. Wiegand, Division of Emerson Electric Co., 7500 Thomas Blvd., Pittsburgh, Pennsylvania 15208

National Labor Relations Board
Complaint and Notice of Hearing

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

Case No. 6-CA-10781

E. L. WIEGAND DIVISION, EMERSON ELECTRIC CO.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 1020

COMPLAINT AND NOTICE OF HEARING

It having been charged by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1020, herein called the Union, that E. L. Wiegand Division, Emerson Electric Co., herein called Respondent, has engaged in, and is now engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Section 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for Region Six, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 3, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. A true and correct copy of the charged filed by the Union on December 14, 1977, was duly served by registered mail on Respondent on December 14, 1977.

2. Respondent, a Missouri corporation with its principal facility located in Pittsburgh, Pennsylvania, is engaged in the manufacture and nonretail sale of electrical surface units for appliances and industrial electrical heaters. During the twelve-month period immediately preceding the issuance of this Complaint and Notice of Hearing, Respondent purchased for use at its Pittsburgh facility goods and materials valued in excess of $50,000 directly from firms or enterprises located outside the Commonwealth of Pennsylvania, and sold and shipped goods and materials manufactured at its Pittsburgh, Pennsylvania facility, valued in excess of $50,000, directly to firms or enterprises located outside the Commonwealth of Pennsylvania.

3. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

5. Respondent and the Union were parties to a collective-bargaining agreement covering the period November 1, 1974, through October 31, 1977. This collective-bargaining agreement provided, *inter alia,* for the payment of accident and sick benefits which the employees named in paragraph 7 below were receiving as of October 31, 1977.

6. On or about November 1, 1977, certain of Respondent's employees engaged in a strike on behalf of, and in support of, the Union.

7. Since on or about November 1, 1977, Respondent, by its officers, agents and representatives, discontinued and thereafter failed and refused to pay accrued accident and sick benefits due its employees listed below:

Joseph Bartunek	Charles Evins	Art Mosely
Dorothy Beaman	Roger Fletcher	William Nieding
Al Bodnar	Paul Gorman	Harold Reynolds
Bernard Casey	William Hooper	R. Robinson
Edward Chambers	Earl Kramer	Fred Sciulli
R. Connor	Joseph Lawrence	M. Suley
Tom Comptaron	Martin McCoy, Jr.	S. Thorpe
Karl Davis	Robert Meyers	Marion White
William Duckworth		

8. Respondent discontinued and failed and refused to pay the accrued accident and sick benefits referred to in paragraph 7 above, and has continued to fail and refuse to pay any accrued accident and sick benefits to the above-named employees, because of the strike referred to in paragraph 6 above, despite the fact that the aforesaid employees did not engage in, or participate in, the strike referred to in paragraph 6 above.

9. By the acts described in paragraphs 7 and 8 above, and by each of said acts, Respondent did discriminate, and is discriminating, in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and Section 2(6) and (7) of the Act.

10. By the acts described in paragraphs 7 and 8 above, and by each of said acts, Respondent did interfere with,

restrain and coerce, and is interfering with, restraining and coercing, its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

11. The acts of Respondent described in paragraphs 7 and 8 above, occurring in connection with the operations of Respondent described in paragraphs 2 and 3 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

12. The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and 3 and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 10th day of January 1979 and consecutive days thereafter until concluded, at ten o'clock in the forenoon, Eastern Standard Time, in a hearing room of the National Labor Relations Board, 8th Floor, Porter Building, 601 Grant Street, Pittsburgh, Pennsylvania, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

Form NLRB-4668, a summary of standard procedures in formal hearings held before the National Labor Relations Board in unfair labor practice cases, is attached.

You are further notified that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof, and that unless Respondent does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

Dated at Pittsburgh, Pennsylvania, this 31st day of August 1978.

/s/ HENRY SHORE

Henry Shore
Regional Director, Region Six
National Labor Relations Board
10th Floor, Porter Building
Pittsburgh, Pennsylvania 15219

Decision and Order of Administrative Law Judge, National Labor Relations Board, Dated March 16, 1979

JD-140-79
Pittsburgh, PA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case 6-CA-10781

E.L. WIEGAND DIVISION, EMERSON ELECTRIC CO.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 1020

Robert Flint, Esq.,
for the General Counsel.

Martin D. Heyert, Esq., of
Kelley, Drye & Warren, of
New York City, for the
Respondent.

Donald Ladov, Esq., of
Basking, Boreman, Wilner,
Sachs, Gondelman & Craig,
of Pittsburgh, PA, for the
Charging Party.

DECISION

Statement of the Case

THOMAS A. RICCI, A.L.J.: A hearing in this proceeding was held in Pittsburgh, Pennsylvania, on January 10 and 11, 1979, on complaint of the General Counsel against E.L. Wiegand Division, Emerson Electric Co., here called the Respondent, or the Company. The complaint issued on August 31, 1978, based upon a charge filed on December 14, 1977, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1020, here called the Union. The issue presented is a plain and single one: May an employer discontinue sick and accident benefits being paid to employees who are in fact sick and therefore unable to work, merely because the rest of the employees choose to engage in an economic strike?

Upon the entire record and from my observation of the witnesses I make the following:[1]

Findings of Fact

I. The Business of the Respondent

The Respondent, a Missouri corporation, is engaged in the manufacture and nonretail sale of electrical surface units for appliances and industrial electrical heaters, and maintains one place of business in Pittsburgh, Pennsylvania. During the 12-month period preceding issuance of the complaint, for use at this location the Respondent purchased goods and materials valued in excess of $50,000 di-

1. A motion by the Respondent to correct certain inadvertent typographical errors in the transcript is hereby granted.

rectly from suppliers located outside the Commonwealth of Pennsylvania, and shipped goods from this one location valued in excess of $50,000 directly to purchasers located outside the State. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The Case in Brief

The Union has for years represented the approximately 1100 employees at this one Pittsburgh plant of the Respondent. The parties' last collective-bargaining contract by its terms expired on October 31, 1977. Unable to come to terms with the employer during a number of negotiating meetings before that date, the Union called a strike beginning precisely on November 1, the moment the contract expired. Every man then at work joined the strike—i.e., personally decided to withhold his services in concert with his fellow workers. The plant was closed completely from that day to February 28, 1978, when, agreement having been reached between company and union, everyone who was well enough to work came back.

The day the strike started 22 employees were physically unable to work, sick or otherwise disabled for one reason or another. Some were at home, some were in the hospital, and some perhaps even able to walk outside, but, as all parties to the proceeding precisely stipulated at the hearing, each and everyone was that day "sick," and unable to

work. Each of these men was also that day—or at least on October 31, the last before the strike—receiving from the Respondent what was called "S. and A." benefits. This was a weekly amount in cash, the period for which he was to receive such benefits varying with each man's length of service with the Company, as provided in the collective-bargaining agreement, both that which expired at that time and the 3-year contract which had preceded it.

At their last meeting on October 31, the union representatives, with the talk of strike in the air, told the company agents that because the 22 sick men "were not participants of any forthcoming strike," the Company would be obligated to continue the payments. The Company's response was that the payments would be cut off "if we went out on strike." In the words of Leonard McElhinney, the Respondent's vice president of industrial relations, at the hearing: "The Company said they were not obligated to pay strikers to support the strike, ..." Then, as well as a week later, the Union strongly protested, and threatened to file NLRB charges, but the Respondent held firm to its stated position throughout the strike. All S and A payments were discontinued as of November 1.

During the 4-month period of the strike—November 1 to February 28—some of the 22 received medical certification of their recovery and their qualification for work, and forwarded the usual appropriate papers to the personnel office. Others were still disabled on February 28, some as continuing hospital patients. The day after the strike ended, the Respondent resumed paying the S and A benefits to all those of the 22 still sick and disabled.

The complaint alleges that withholding of these S and A benefits to those employees who continued in disabled

status which had started before the strike, was a coercive act, in violation of Section 8(a)(3) and (1) of the statute. It is called an unlawful restraint upon the rights of all the employees to engage in protected concerted activities. There is no question but that the strike was purely economic and absolutely legal under the law.

In defense a number of conclusionary assertions are advanced on behalf of the Respondent. If a single summary statement for the variously phrased assertions is possible, it is that the 22 disabled persons were strikers, or at least in the position where the Respondent had a right to treat them as it does strikers. Of course, the argument goes, no employer is obligated to help finance a strike aimed at destroying its economic viability. To make the defense sound more convincing, the Respondent passingly calls the S and A benefits wages, and then asks: How can an employer be faulted for not paying wages to an employee who chooses to strike instead of to work for his pay?

There is practically no dispute as to the facts. It is, all told, a matter of reducing complex and oblique phraseology into plain English, and answering the very simple question posed by the complaint.

Further Evidence, Analysis and Conclusion

That the Respondent held back this financial benefit from the 22 employees because of the strike activity by the complement of over 1000 employees as a whole, could not be clearer. Its agent told the Union, on the last day of the old contract—if you strike, those people lose the money. McElhinney was not telling the sick men at home, or in the hospital, that if they took such concerted action against

their employer they would pay a price. There can be no question but that the very purpose of the planned hurt to the sick men was to restrain, to coerce, the perfectly protected union activity intended by the employee group. The discrimination against the 22—now you have the money, now you don't—fitted squarely into the language of Section 8(a)(3). On its face it was an unfair labor practice, and I so find.

1. If it was an unfair labor practice for the Respondent to have discontinued this payment to a man on the first day of the strike, that man must be made whole for what he thus lost throughout the period starting on November 1, and ending the day he became well enough to return to work, if he recovered sufficiently during the 4-month strike. Inquiry into the question of how long he remained ill, and therefore how much is now due him, is a matter that is investigated only in the compliance stage of Board proceedings. This is because if no unfair labor practice was committed to start with, there is no remedy to be concerned with at all.

One of the major contentions made by the Respondent in defense is that if a man goes off the sick list a few days, maybe a few months, after the start of the strike, and then joins the strikers, this proves he was a striker from the start. Respondent did prove that one man—Suley—recovered 3 weeks after November 1, sent in the appropriate medical certificate to that effect, and then joined the picket line 5 days later. Understandably, the Respondent keeps records of medical certificates showing when employees being paid S and A benefits are able to return to work. It produced such records showing that Bernard Casey, who

had also been in the hospital, was recovered as of January 3, 1978, Fred Sciulli as of January 25, Joseph Bartunek as of January 25, Al Bodnar as of January 23, and Richard Connor as of November 28, 1977. Of considerable significance, however, the records also show that Victor Giglio—another man—went into the hospital on October 17 and was still there when the strike ended; he did not leave the hospital until June 15, 1978. When did Giglio become a striker? As to the remaining 15 men named in the complaint the record shows nothing about when their actual disability ended so as to render them no longer entitled to the S and A benefits.

In its long history of decisions dealing with strikers, the Board has sometimes protected them against employer discrimination and sometimes abandoned them to deserved disadvantage, depending upon how they went about striking, or when they chose to hit at their own, or somebody else's employer. But throughout the years it has been the conscious withholding of services by the employee himself that put him in the category of a striker before any consideration would be given at all to his protected or unprotected status under the statute. A striker is different from a nonstriker because the first chooses to withhold his services and the other does not. And in order to choose, he must be in a position to make the choice. The child-like simplicity of this language, is compelled, because some things cannot be stated any other way. How a man who—by very plain stipulation of the parties—is unable to work even if he wants to do so, can nevertheless be deemed a striker, defies logical comprehension.

There are many ways in which an employee can give evidence of an intent to withhold his services in concert with

fellow workmen. Sometimes the evidence is indirect, but proof of such intent there must be. A man who is on vacation, at his own request, when a strike starts, and returns to find half the employees walking the picket line and half working, by his mere failure to report for duty on schedule can certainly be found—by rational inference in the light of the circumstances—to have joined the strike quite consciously. I suppose he can also be said to have become a striker if he finds everybody outside and no work being performed inside the factory at all. He may well have a duty, again in the circumstances, to tell the employer he wishes to work, if he desires to avoid the reasonable contrary implication. Cf. *Bechtel Corp.*, 200 NLRB 503. But to say, as does the Respondent here, that the man—sick in the hospital—who in no event could possibly go to work, must be called a striker because he did not tell management he wanted to work, borders upon the absurd.

The industrial relations manager testified that none of the 22 sick men "advised the company that they were disavowing the strike." But, unlike the returning vacationer, there was nothing these people had to, or even could, disavow. If there were some, in the case at bar, who recovered during the strike and were medically certified as well enough to work, but did not overtly offer to return, I would put them with the strikers, then then, nobody is saying the Respondent was remiss in not continuing S and A benefits to such a man. It is the proposed reasoning that because a man later chooses to become a striker, it follows he also did so earlier when he was not, that I reject.

2. The devious reasoning which underlies the defense is particularly illustrated by one special contention made at the hearing. There came a time in January, the third

month of the strike, when the Respondent sought an injunction in the local courts based on allegations of mass picketing and violence by the Union on the picket line; the Union consented to the decree and a restraining order was issued. On the basis of this fact, counsel for the Company then argued, on the record, that one is entitled to receive S and A benefits "only if you are prevented from working solely because of sickness or injury," but that "these folks during the strike period were prevented from working, not solely because of sickness and injury, but because of the strike . . . ." What he was really saying is that while it is true there is no evidence "these folks" wanted to, or made any attempt to go to work—as, of course, they could not—had they tried to do so they would have been prevented from entering the plant by the mass picketing and violent misconduct by the Union, therefore, treat them as though they were both able, and desirous of going to work—and never mind the fact that the evidence shows conclusively they never enjoyed the capacity to go to work at all! It is a kind of "reasoning" that cannot be answered coherently.

3. This sort of play on words went on and on at the hearing. At another point the Respondent called the S and A benefits "wages." ". . . accident and sickness benefits are a continuation of wages that an employee otherwise would have earned, but for his being sick and/or injured, and that during the course of this strike, there would not have been any earnings for these employees because of the strike, ..." The distortion is seen in the fact that the benefits being paid the sick people were not compensation for contemporaneous delivery of services at all, but rather payment for past work performed. Their entitlement to

that money depended not one wit upon their working at that time.[2] That it was deferred payment for work—albeit conditional upon their being sick and disabled—is true, but for work performed by them in the past, not in the present. Indeed, this is why the man who worked 30 years received more weeks of S and A benefits while sick than the man who had only performed as an employee a year, or two, or three. If the sick man must come out of the hospital and work during a strike to receive a benefit he sweated for in prior years, must the retiree, who is collecting the pension he earned over 35 years, also come back, merely because the working complement is striking at the moment? To ask the question is to answer it.

4. Another defense is an attempted parallel between this case and the economic closing, by an employer, of a plant. In such a case the employer must bargain with the established majority representative about "the effects" of the closing upon the welfare of the employees about to be sent home. The Respondent says it bargained about this when, the day before the strike, the Union demanded that the S and A benefits be continued even during the strike, but the Respondent came back with the proposal that the payments be discontinued. The parties could not agree. This was "an impasse" in bargaining, according to the Respondent, whereupon it had a right to put in effect its last offer—i.e., stop the payments. But when the parties

2. It must be noted that in this case the complaint does not allege any impropriety in the Respondent's discontinuance of payment of insurance premiums for one kind of benefit or another, to assure payment in the event of death or hospital bills occasioned by events that might have occurred during the strike. Prior Board decisions like *Towne Chevrolet*, 230 NLRB 479, cited in the Respondent's brief, are therefore inapposite.

disagreed on this subject on October 31 they were quarelling about a question of law and not about what conditions of employment should be tomorrow. The money these people had coming to them was payment for work previously performed, and not what would be payable to them for future services one day to be rendered. This defense amounts to no more than words without meaning.

5. There is one contention that is at least understandable, though I find it not a good defense to this complaint. There is some proof that several of the sick men indicated, even while they were unable to work, that they believed it was a good idea for their fellow workers who could do so to strike. There are photographs, received in evidence, showing some of the 22 men named in the complaint on the picket line. As in other aspects, the record as a whole is misleading on this point too, again because the period-span of individual disability was injected haphazardly into the total story. If a man's face showed upon a picket line photograph taken in January—the third month of the strike, it may well be that man was no longer entitled to S and A benefits, and in that event his presence there—even if it proves he then approved of the strike—is of no help to this particular argument of the Respondent. But it may be that some of the men shown on the picket line at that time was still disabled—as far as work was concerned. It is that particular situation to which this defense argument applies.[3]

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3. That this is at best only a partial defense to the complaint is shown by the fact some of the men testified they told the Company, in November, or early December, when their money stopped coming, that they were not striking. Thus, Susan Thorpe called the personnel office on the phone and said "I wanted to know why, because I wasn't

(footnote continued on next page)

In my judgment the analogy is to the protected expression of opinion by any management representative. No matter how often he voices his opinion that collective bargaining, or unionism in any other form, is a bad thing, no matter how disturbing his such statements be to the union enthusiast, there can be no finding that he materially or economically did anything wrong, illegal, in contravention of this statute. Here the question is was the sick man a striker. The fact he may have said, no matter when, that in his opinion striking is a good thing, cannot support a finding that he is in fact a striker, or took any action against his employer. Nobody can find the employer, nor indeed any respondent, did what he never did, so long as his expressions of opinion are protected by law. By like reasoning, no employer can act towards an employee as though he in fact were a striker, when in fact all the workman did was express his opinion as to the merits of protected concerted activity.

6. A final suggested concept. There came a time, in mid-December, when the Union took pity on those of its members who were being subjected to this deprivation by their employer. Established UAW rules say only strikers receive authorized strike benefits. These 22 men not being strikers, they were not receiving such strike benefits between November 1 and December 12, despite the Union's persistent efforts to convince the Company. There there-

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a striker, I was on disability." The only answer she got was "that it was the company's policy." Michael Suley also called the company office. "I said I'm not on strike, I didn't participate in the strike at all, I didn't take a strike vote, I was on sick leave, nobody contacted me that they had cut my benefits off, and this was the first I had heard about it, and she said there's nothing I can do, it's the company policy . . . ." There is like testimony by Victor Giglio.

fore was an extraordinary exception made in the special circumstance, and from December 12 on the Union paid them too the same amount it was giving the strikers.

Does it follow from this fact that the Union made strikers of people who were not, and could not be strikers? I think not.

I do not read the split decision in *Southwestern Electric Power,* 216 NLRB 522, as mandating a contrary decision here. Read together with the Board's later decision in *Indiana and Michigan Electric,* 236 NLRB No. 110, I cannot say it is today a Board rule of law that the mere expression of opinion concerning the merits of strike action by persons who are in no conceivable sense capable of engaging in strike action suffices to make strikers of people who simply are not. In the latter case the employees in question were actually on strike, and the Board found it to have been an unfair labor practice by their employer to have withheld leave pay due on the basis of work previously performed, saying that "the pay had already been earned." Like them, the 22 employees named in this complaint had already earned their S and A benefits before the strike started.

Motion To Dismiss

When the parties reached agreement upon the terms of a new contract and ended the strike, on February 28, 1978, they signed a memorandum of agreement. It provided, among other things, that the Union would withdraw any charges then pending before this Board. The pertinent language reads as follows:

> It is further understood and agreed that all pending grievances, charges, civil and/or criminal proceedings arising out of or in relation to actions taken or occur-

> ring during the strike, including those relating to actions or proceedings brought by or against individuals, shall be withdrawn with prejudice or the parties shall cause them to be so withdrawn.

Relying upon this language, the Respondent moves for dismissal of this complaint. The motion is denied.

The Board acts in the public interest to enforce public, not private, rights. *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. [250]; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261; *Agwilines, Inc.* v. *N.L.R.B.*, 87 F. 2d 146 (C. A. 5). "Whenever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to futility." *J.I. Case* v. *N.L.R.B.*, 321 U.S. 332.

Section 10(a) of the Act explicitly provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." Accordingly, the "parties cannot by contractual agreement divest the Board's function to operate in the public interest." *Boire* v. *International Brotherhood of Teamsters*, 476 F. 2d 778 (C.A. 5).

IV. The Remedy

It having been found that the Respondent unlawfully withheld sick and accident benefit payments to the 22 employees named in the complaint, it must be ordered, in remedy, to pay them what money was due them, with interest. The period for which such reimbursement must be made is from November 1, 1977, through February 28, 1978. Those of the 22 employees who ceased being sick or disabled during that period, of course will be paid only what sick

and accident benefits were due them to the day of their recovery.

V. The Effects of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set out in section III, above, occurring in connection with the operations of the Respondent described in section I, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. By withholding from November 1, 1977, through February 28, 1978, payment of sick and accident benefits to employees named in the complaint herein, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

2. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following:[4]

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4. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

The Respondent, E.L. Wiegand Division, Emerson Electric Co., Pittsburgh, Pennsylvania, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Withholding payment of sick and accident benefits from employees for the purpose of coercing them or other employees in the exercise of their rights to engage in protected concerted activities, including strike.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Make whole the employees listed in the complaint by paying to each what sick and accident benefits were due them during the period November 1, 1977, to February 28, 1978, with interest pursuant to present Board law.

(b) Preserve and make available to the Board or its agents, upon request, all records necessary to analyze the amount due in the effectuation of this remedial order.

(c) Post at the Respondent's place of business in Pittsburgh, Pennsylvania, copies of the notice attached hereto and marked "Appendix."[5] Copies of said notices, on forms

5. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

provided by the Regional Director for Region 6, after being duly signed by its representatives, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. March 16, 1979

/s/ THOMAS A. RICCI

Thomas A. Ricci
Administrative Law Judge

APPENDIX

[SEAL] NOTICE TO EMPLOYEES [SEAL]

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

THE NATIONAL LABOR RELATIONS BOARD HAVING FOUND, AFTER A TRIAL, THAT WE VIOLATED THE FEDERAL LAW BY WITHHOLDING SICK AND ACCIDENT BENEFITS TO OUR EMPLOYEES BECAUSE OF AN ECONOMIC STRIKE ENGAGED IN BY OUR TOTAL EMPLOYEE COMPLEMENT:

WE WILL NOT withhold sick and accident benefits payable to each of the 22 employees named in the complaint in this proceeding throughout the period November 1, 1977, to February 28, 1978, or otherwise discriminate against employees, because of any union activity by any of our employees, including strikes.

WE WILL pay all the named 22 employees interest upon such monies due from the time it was withheld.

E.L. WIEGAND DIVISION,
EMERSON ELECTRIC CO.

(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building—10th Floor, 601 Grant Street, Pittsburgh Pennsylvania 15219 (Tel. No. (412) 644-2973)

Decision and Order of the National Labor Relations Board, Dated December 19, 1979

246 NLRB No. 162

FJFT
D—5110
Pittsburgh, PA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 6—CA—10781

E. L. WIEGAND DIVISION, EMERSON ELECTRIC CO.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 1020

DECISION AND ORDER

On March 16, 1979, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions, a supporting brief, and a supplemental brief, and the General Counsel filed an answer to Respondent's supplemental brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief[1] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

1. The Employer's request for oral argument is hereby denied, as the record and briefs adequately present the issues and the positions of the parties.

We adopt the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(1) and (3) of the Act by terminating sick and accident benefits, called "S and A" benefits, to employees who were physically unable to work on and after November 1, 1977,[2] because other employees actively employed at Respondent's facility went out on strike. In support of this conclusion, we emphasize the fact that Respondent's declaration that these benefits would not be paid to employees who would otherwise receive them came at a time when a strike of its facility was imminent, but before there was any showing of how widespread the strike would be, and before Respondent was aware that any of the employees who were unable to work ratified or actively supported the strike. Furthermore, Respondent terminated these benefits immediately upon the commencement of the strike despite a union representative's clear protest that the individuals who were unable to work were not participants in any strike. In these circumstances, we agree with the Administrative Law Judge that Respondent's announcement of the termination of these benefits was intended to coerce and restrain the protected union activity with respect to the strike, by imposing a sanction against certain unit employees if others in the unit engaged in strike activity.

In reaching this conclusion, however, we need not consider whether the Administrative Law Judge adequately distinguished *Southwestern Electric Power Company,* 216 NLRB 522 (1975), because, on further consideration, we find then-Member Fanning's dissent therein persuasive. In that case the majority held that an employer may reasonably believe that employees on sick leave before a strike

2. Unless otherwise indicated all dates are 1977.

support it solely on the bases that the strike is effective and the employees are union members, despite the fact that the employer has no way of knowing with certainty whether the employees on sick leave do or do not support the strike activities of their fellow employees. The majority therefore concluded that the employer acted lawfully by terminating sick leave benefits to employees prior to any showing that they affirmatively supported the strike. In rejecting this rationale, we conclude that an employer may not rely on such speculative grounds to justify the termination of existing disability benefits to employees which, as found here by the Administrative Law Judge, had accrued to them as a result of past work performed. We agree with the language of that dissent, which states:

> In short, these employees had a Section 7 right to refrain from declaring their position on this strike while they were medically excused. [*Id.* at 523.]

Consequently, an employer may no longer require its disabled employees to disavow strike action during their sick leave in order to receive disability benefits. To allow the termination of such benefits to certain employees as a result solely of the strike activities of others is to penalize the employees who have not yet acted in support of the strike.[3] To the extent that *Southwestern Electric Power Company, supra,* is inconsistent with our decision herein, it is hereby overruled.

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3. Where sanctions are imposed by an employer for picket line misconduct, we have held that, before an employer may rely on an honest belief that a striking employee engaged in such misconduct, it must obtain proof that the specific employee engaged therein, and may not rely on the conduct of other strike participants. *Coronet Casuals, Inc.*, 207 NLRB 304, 305 (1973). We find that the necessity for a showing of such individual participation is likewise applicable where the conduct involved concerns the initial engagement in strike activity.

However, while disabled employees need not affirmatively disavow the strike action, neither can they participate in the strike without running the risk of forfeiting benefits prospectively.[4] In this regard, the Administrative Law Judge has incorrectly concluded that Respondent may not rely on evidence that some of its employees who had been receiving disability benefits prior to the strike were later seen participating in the strike by their appearance on the picket line.[5] Although a showing of participation in the strike does not justify *post hoc* Respondent's initial termination of benefits to these employees,[6] we nevertheless do not consider participation in the strike to be protected expressions of opinion, as found by the Administrative Law Judge. For all practical purposes, any employee, disabled or sound, who affirmatively demonstrates his support of the strike by picketing or otherwise showing public support for the strike, has enmeshed himself in the ongoing strike activity to such an extent as to terminate his rights to continued disability benefits.[7] This result represents a fair

4. The employees' actions in support of the strike, however, may not be used to deprive them of any benefits for time away from work *prior* to their supportive action.

5. The record shows that at least the following named disabled employees were present on the picket line or among the strikers during the course of the strike: Joseph Bartunek, Bernard Casey, Edward Chambers, Tom Comptaron, Charles Evins, Roger Fletcher, and Michael Suley. While the evidence also shows that Richard Conner and Ray Robinson were observed on the picket line and that they were disabled at the commencement of the strike, additional evidence shows that their appearance on the picket line occurred after their recovery from disability.

6. See fn. 4, above.

7. See Chairman Fanning's dissent in *Southwestern Electric, supra,* which also recognizes a limitation on the remedy for sick employees who have supported the strike. We find that such affirmative support for the Union's strike activities was also shown by evidence that Joseph Lawrence, during the period of his disability, worked in the Union's office answering telephone calls.

accommodation between the rights of employees and the interests of employers. For, while employees have the protected right to receive disability benefits without disavowing the strike, an employer should not be obligated to finance a strike against itself, as would be the case if we ordered Respondent to pay such benefits for the period during which the disabled individuals participated in strike activity.

Accordingly, we now hold that for an employer to be justified in terminating any disability benefits to employees who are unable to work at the start of a strike it must show that it has acquired information which indicates that the employee whose benefits are to be terminated has affirmatively acted to show public support for the strike. Barring such affirmative action, of course, we agree with the Administrative Law Judge that the disabled employees found herein to have been discriminated against are entitled to "S and A" benefits for the full length of their sickness or disability.[8]

While the complaint, as amended at the hearing, includes the names of 23 individuals who were affected by the termination of "S and A" benefits, the Administrative Law Judge referred to the existence of only 22 such employees in his Decision without specifically naming them. We find

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8. While Member Jenkins agrees with most of our decision, he would further order Respondent to provide disability benefits for the period during which some of the disabled employees appeared at the picket line or showed other public support for the strike. Member Jenkins opines that the picketing by the disabled employees probably did not demonstrate solidarity in support of the strike. Rather, according to Member Jenkins, the picketing and other supportive action was more likely in protest over Respondent's withdrawal of benefits. We find no evidence from which to draw any such inference. We will not engage in such warrantless speculation when, from all appearances, the supportive actions by the disabled employees—including that of Joseph Lawrence, who assisted the Union in its office during the strike—speak for themselves.

this omission constitutes inadvertent error, even in the absence of an exception thereto, particularly as all such employees were treated identically by Respondent, and the Administrative Law Judge concluded that Respondent had violated Section 8(a)(1) and (3) with respect to all of the employees named in the complaint and provided in his recommended Order that all of them be made whole.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, E. L. Wiegand Division, Emerson Electric Co., Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Make whole the employees listed in the complaint by paying to each whatever sick and accident benefits were due them during the period November 1, 1977, to February 28, 1978, with interest; provided that no such payment shall be due for the periods subsequent to any employee's active participation in strike activity or public support therefor."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. December 19, 1979

John H. Fanning, Chairman

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JENKINS, dissenting in part:

While I agree with the majority's finding that Respondent unlawfully and discriminatorily terminated the "S and A" benefits due employees subsequent to the commencement of the strike, and additionally agree that *Southwestern Electric Power Company, supra,* should be overruled, the basis for my conclusion that a violation has been established here departs somewhat from the majority view. Furthermore, regardless of the basis for the finding of a violation, the remedy established by the majority's failure to order Respondent to make whole employees for all disability payments unlawfully withheld unduly penalizes the victims of Respondent's discriminatory retaliation.

Respondent's disability plan operates as a form of self-insurance whereby employees, who as a result of sickness or accident are unable to work, are provided with 60 percent of their income for periods ranging from 1 to 39 weeks, depending on their seniority. As the extent of this benefit is directly a function of employee seniority, it is apparent that the benefit is a form of compensation for past services and is fully vested upon the commencement of the employee's actual disability. Consequently, I can conceive of no event other than recovery which would terminate Respondent's fully vested obligation to continue such payments for all employees on disability prior to the strike.[9] To this extent, I would find that employees have the same right to accrued disability benefits as they have to accrued vacation

9. Because the disability benefits are applicable only when the particular employee is unable to work, the benefit is obviously not conditioned on continued provision of services to Respondent.

benefits.[10] In either case, a strike subsequent to the accrual of these benefits does not serve to deprive the employee of these benefits.[11]

My colleagues in the majority, however, conclude that disabled employees who show any form of public support for the strike, such as visiting the picket line, have enmeshed themselves in the ongoing strike activity to such an extent so as to terminate their right to continued disability payments. This conclusion is apparently premised on the theory that such an employee has affirmatively indicated that he would have withheld his services had he been physically able to have worked. However, the prerequisite for the individual employee's entitlement to disability benefits, that he not be able to work due to sickness or accident, necessarily places him in circumstances at variance with that facing the remaining active employees. The latter, due to their physical health, are in the position of individually deciding at the commencement of the strike whether to continue providing services to Respondent. Others on disability, however, due to circumstances beyond their control, are never given this option to work or not.[12] The fact that

10. I note, however, that the point of accrual of vacation benefits typically is different from the point of accrual of disability benefits. Although both usually require the completion of specified period of employment, disability benefits are additionally contingent on a second event, *viz* the actual disability.

11. See *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *Knuth Bros., Inc.*, 229 NLRB 1204 (1977); *Elmac Corporation*, 225 NLRB 1188 (1976); *Borden Inc., Borden Chemical Division*, 235 NLRB No. 138 (1978), enforcement denied 600 F. 2d 313 (1st Cir. 1979).

12. The degree of physical recovery which would enable an employee to participate in picketing to some extent is not tantamount to full recovery which would revive the employee's option to return to work, particularly in production positions at Respondent's electrical heater manufacturing plant.

a disabled employee, through some manner of participation in the picketing, may have expressed a certain degree of support therefor is insufficient to render him a striker, due to the inherent inability of the disabled employee to do that act which is the *sine qua non* of striker status: the voluntary withholding of services from the employer in support of a labor dispute. This Board has consistently refused to find that the category of picket is identical to that of striker or that picketing is mutually inconsistent with otherwise being an active employee.[13] Given that an employee generally may picket an employer without prejudice to his rights as an otherwise active employee, so too may a disabled employee engage in picketing without prejudice to his employment rights as a disabled employee. Consequently, the presence of disabled employees on the picket line is insufficient to establish that they are strikers or should be treated as such, particularly as this choice was never open to them.[14]

Whatever validity there is in cutting off disability benefits at the time the disabled employee publicly supports a strike vanishes here because of Respondent's prior commission of an unfair labor practice aimed specifically against these employees on disability at the start of the strike. The majority ignores this misconduct by the Respondent. Although public participation in a strike may express the employee's complete solidarity with those who

13. *Edir, Inc., d/b/a Wolfie's*, 159 NLRB 686, 693-695 (1966); *Sears, Roebuck & Co.*, 168 NLRB 955 (1967); *Vincent F. Lang and Wilma Lang, d/b/a La Mesa Convalescent Hospital*, 217 NLRB 182 (1975); *Shoppers Drug Mart, Inc.*, 226 NLRB 901, 910 (1976).

14. The majority's argument, at its limits, consistently could find that a healthy employee who pickets an employer during off-duty hours has thereby relinquished all right to further benefits stemming from his employment relation. The only additional factor present here is that the disabled employee has nothing but off-duty hours.

have voluntarily chosen to strike, this is hardly the motive most readily extracted from the events here. A more likely explanation is that his strike participation was a protest over the specific unlawful withdrawal of benefits then due him and was unrelated to the economic motives of the other striking employees.[15] While a disabled employee who appeared on the picket line may have been guided by other considerations,[16] further speculation as to the disabled employee's actual motivation for any general strike activity is unwarranted. In *Abilities and Goodwill, Inc.*, 241 NLRB No. 5 (1979), we stated that where an employer unlawfully discharges a striker we will not indulge in the presumption that the employee's subsequent participation in the strike is unrelated to the employer's unlawful conduct so as to limit the remedy.[17] The majority however, uses the exact opposite presumption and holds that, regardless of the unfair labor practices, any subsequent participation in picketing is in full support of the strike. Accordingly, they rule that a disabled employee who seeks to protest the unlawful withholding of his benefits by appearing on the picket line

15. The present strike occurred upon the termination of a bargaining agreement, and the General Counsel does not allege that the strike was other than economic in origin.

16. The evidence here shows that, after Respondent terminated all disability benefits on November 1, the Union did not automatically provide disabled employees with strike benefits, due to its initial uniform application of the rule that no strike benefits would be paid unless the individual participated in the strike. The Union maintained this position until December 12, after which it waived this requirement and began paying strike benefits to all disabled employees, regardless of their participation in the strike. In view of the economic hardship faced by these employees as a result of Respondent's unlawful termination of their benefits, it is apparent that these employees may not have had a free choice to refrain from engaging in strike activity and may have been economically compelled to do so just to qualify for some form of income.

17. *Id.*, sl. op., p. 5.

instantly loses any further right to those benefits.[18] Such a limitation on the remedy penalizes disabled employees who protest unlawful conduct directed at them and serves as a windfall to Respondent who is thereby allowed to profit from his wrongdoing. Contrary to the majority's claim, ordering a full remedy would not force an employer to finance strike activity against it, for an employer is not required to compensate employees for services withheld due to strike activity.[19]

For the reasons stated above, I would not find that the presence of disabled employees on the picket line deprives them of their disability benefits, and I therefore dissent from the majority's failure to order the full payment of all such unlawfully withheld benefits.

Dated, Washington, D.C. December 19, 1979

Howard Jenkins, Jr., Member

National Labor Relations Board

18. The majority's finding that the disabled employee who has been seen among strikers has "joined" the strike places him at an additional disadvantage of not being able to get out of the situation by requesting reinstatement to his former position. Thus, unlike the strikers, he is in no position to make a good-faith offer to return to work.

19. See *Edir, Inc., d/b/a Wolfie's, supra,* and *Sears, Roebuck & Co., supra.*

MEMBER PENELLO, dissenting:

I find that the position advanced by the majority of the Board in *Southwestern Electric Power Company*, 216 NLRB 522 (1978), in which I participated, presents a correct analysis of the issues involved in determining the legality of the termination of disability benefits during strikes. Accordingly, I would not overrule that decision, and I would dismiss the present complaint.

Dated, Washington, D.C. December 19, 1979

John A Penello, Member

NATIONAL LABOR RELATIONS BOARD

D-5110

APPENDIX

Notice To Employees

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Act gives all employees the following rights:

To organize themselves

To form, join, or support unions

To bargain as a group through a representative they choose

To act together for collective bargaining or other mutual aid or protection.

To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

We Will Not withhold payment of sick and accident benefits payable to each of the 23 employees named in the complaint in this proceeding throughout the period November 1, 1977, to February 28, 1978, or otherwise discriminate against employees, because of any union activity by any of our employees, including strikes.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole all the named 23 employees for sick and accident benefit payments due them from the time it was withheld, until their recovery or their active participation in strike activity, whichever is earlier, with interest.

E. L. WIEGAND DIVISION,
EMERSON ELECTRIC CO.

(Employer)

Dated ———— By ————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building, 10th Floor, 601 Grant Street, Pittsburgh, Pennsylvania 15219, Telephone 412-644-2969.

Judgment of the United States Court of Appeals for the Third Circuit, Dated May 13, 1981

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-2836

E. L. WIEGAND DIVISION, EMERSON ELECTRIC COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 80-1399

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL 1020,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Before: ADAMS, SLOVITER, Circuit Judges, and BROTMAN, District Judge*

* Hon. Stanley S. Brotman, United States District Court Judge for the District of New Jersey, sitting by designation.

The above consolidated causes came on to be heard upon the petitions of E. L. Wiegand Division, Emerson Electric Company and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 1020, to review an order of the National Labor Relations Board issued on December 19, 1979, against petitioner in No. 79-2836, and upon a cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on November 7, 1980, and has considered the briefs and transcript of record filed in this cause. On April 13, 1981, the Court, being fully advised of the premises, handed down its opinion granting enforcement of the Board's order, as modified.

ORDERED AND ADJUDGED by the Court that the Petitioner, E. L. Wiegand Division, Emerson Electric Co., Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Withholding payment of sickness and accident benefits from employees for the purpose of coercing them or other employees in the exercise of their rights to engage in protected concerted activities, including strike.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Make whole the employees listed in the complaint by paying to each sickness and accident benefits for the

maximum period of each disabled employee's eligibility or for such employee's period of disability as defined in the plan, whichever is shorter, with interest.

(b) Preserve and make available to the Board or its agents, upon request, all records necessary to analyze the amount due in the effectuation of this remedial judgment.

(c) Post at the Petitioner's, (E.L. Wiegand Division, Emerson Electric Company, hereinafter referred to as Petitioner), place of business in Pittsburgh, Pennsylvania, copies of the notice attached hereto and marked "Appendix." Copies of said notices, on forms provided by the Regional Director for Region 6, of the National Labor Relations Board (Pittsburgh, Pennsylvania), after being duly signed by its representatives, shall be posted by the Petitioner immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the aforesaid Regional Director, in writing within 20 days from the date of receipt of this Judgment, what steps the Petitioner has taken to comply herewith.

IT IS FURTHER ORDERED that costs shall be taxed against the Petitioner, E. L. Wiegand Division, Emerson Electric Co.

BY THE COURT

DOLORES K. SLOVITER

Circuit Judge

Dated: May 13, 1981

APPENDIX

Notice to Employees

Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order, as Modified, of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Act gives all employees the following rights:

To organize themselves

To form, join, or support unions

To bargain as a group through a representative they choose

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

We Will Not withhold payment of sick and accident benefits payable for the maximum period of each disabled employee's eligibility or for such employee's period of disability as defined in the plan, whichever is shorter, to each of the 23 employees named in the complaint in this proceeding or otherwise discriminate against employees, because of any union activity by any of our employees, including strikes.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole all the named 23 employees for sick and accident benefit payments due them from the time it was withheld, until their recovery or their active participation in strike activity, whichever is earlier, with interest.

E. L. WIEGAND DIVISION,
EMERSON ELECTRIC CO.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building, 10th Floor, 601 Grant Street, Pittsburgh, Pennsylvania 15219, Telephone 412-644-2969.

Sur Petition for Rehearing, Dated June 25, 1981

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-2836 and 80-1399

E. L. Wiegand Division, Emerson Electric Co.,
Petitioner

v.

National Labor Relations Board,
Respondent

No. 79-2836

and

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 1020,
Petitioner

v.

National Labor Relations Board,
Respondent

No. 80-1399

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges,* and BROTMAN, *District Judge**

* Hon. Stanley S. Brotman, United States District Court Judge for New Jersey, sitting by designation.

The petition for rehearing filed by Petitioner, E. L. Wiegand Division, Emerson Electric Co., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of this circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

DOLORES K. SLOVITER

Circuit Judge

Dated: June 25, 1981

Sur Motion for Leave to File an Amended Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

July 14, 1981

Nos. 79-2386 & 80-1399

E. L. WIEGAND DIVISION, EMERSON ELECTRIC CO.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

No. 79-2836

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL 1020,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

No. 80-1399

Present: SLOVITER, *Circuit Judge.*

1. Motion by petitioner in No. 79-2836, E. L. Wiegand Division, Emerson Electric Co., for leave to file amended petition for rehearing with suggestion for rehearing in banc,

in the above-entitled case in which the opinion was filed on April 13, 1981, and the judgment entered on May 13, 1981.

Respectfully,

/s/ [Illegible]
Clerk

mgp
enc.

P.S. Amended petition for rehearing in banc by petitioner in No. 79-2836, was received in the Clerk's Office on July 13, 1981. Any answers, due July 20, 1981, will be forwarded to the Court upon receipt in this office.

The foregoing Motion is granted.

By the Court,

DOLORES K. SLOVITER
Judge

Dated: July 24, 1981

Sur Amended Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-2836 and 80-1399

E.L. Wiegand Division, Emerson Electric Co.,
Petitioner

v.

National Labor Relations Board,
Respondent

No. 79-2836

and

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 1020,
Petitioner

v.

National Labor Relations Board,
Respondent

No. 80-1399

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges*, and BROTMAN, *District Judge**

* Hon. Stanley S. Brotman, United States District Court Judge for New Jersey, sitting by designation.

The petition for rehearing filed by Petitioner, E. L. Wiegand Division, Emerson Electric Co., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of this circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

DOLORES K. SLOVITER
Circuit Judge

Dated: August 4, 1981

Supreme Court of the United States, Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-203

E.L. WIEGAND DIVISION, EMERSON ELECTRIC COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD AND
INTERNATIONAL UNION, ETC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 2, 1981

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 8th day
of September, 1981

Excerpts from Proceedings Before Administrative Law Judge, National Labor Relations Board

BEFORE THE NATIONAL LABOR RELATIONS BOARD
SIXTH REGION

Case Number: 6-CA-10781

In the Matter of:

E.L. WIEGAND DIVISION, EMERSON ELECTRIC CO.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 1020

National Labor Relations Board,
8th Floor, Porter Building,
Hearing Room #1, 601 Grant Street,
Pittsburgh, Pennsylvania
January 10, 1979

Met pursuant to Notice at 11:00 o'clock a.m.

BEFORE:

HONORABLE THOMAS A. RICCI, ADMINISTRATIVE LAW JUDGE.

APPEARANCES:

ROBERT FLINT, Esq., 10th Floor, Porter Building, 601 Grant Street, Pittsburgh, Pa., 15219, appearing on behalf of the General Counsel.

MARTIN D. HEYERT, Esq., Kelley, Drye & Warren, 350 Park Avenue, New York, NY, 10022, appearing on behalf of the Respondent.

DONALD LADOV, Esq., Basking, Boreman, Wilner, Sachs, Gondelman & Craig, 10th Floor, Frick Bldg., Pittsburgh, Pa., 15219, appearing on behalf of the Charging Party.

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Q. (By Mr. Flint) Was there a contract in effect on October 31st, 1977?

A. [By the Witness, Mr. Scarfi] Until midnight of October 31st.

Judge Ricci: The strike started right after the contract expired?

The Witness: At midnight.

Judge Ricci: Is this the contract that was in effect, what has been marked as G.C. number three?

The Witness: Yes, it was, Your Honor.

Judge Ricci: And this one is dated November 1st, [p. 12] 1974?

The Witness: Yes.

Judge Ricci: Is it okay to take this into evidence?

Mr. Heyert: Yes.

Judge Ricci: I receive into evidence, General Counsel's exhibit number three, the contract in effect just before the strike started.

(The document above referred to was marked General Counsel's Exhibit No. 3 and was received into evidence.)

Q. (By Mr. Flint) The contract that was in effect on October 31st, 1977, does that contract—can you direct us, if I show you that particular contract, to that section related to sickness and accident benefits?

Judge Ricci: Why don't you tell him what page it is, Mr. Flint, so we just don't sit here while he tells us? It's in the exhibit that we're all going to read anyhow, that he cannot alter orally no matter how he tries.

Q. (By Mr. Flint) Look at pages fifty six and fifty seven?

A. Yes.

Q. Can you—based on your experience, can you tell us what the two major classifications of employees are at the E.L. Wiegand Division, or what they were at the [p. 13] time of the strike, November 1st, 1977?

Mr. Heyert: Objection.

Judge Ricci: Overruled, you were asked if you knew if there were two major classifications and how do you answer that question?

The Witness: Yes, there are two major classifications.

Judge Ricci: What are they?

The Witness: Hourly and salaried.

Judge Ricci: And that's also discussed in the contract?

The Witness: Yes.

Judge Ricci: Let's go.

Q. (by Mr. Flint) Were the, or are the benefits for the hourly employees set forth in this '74 agreement?

A. No.

Q. Do you know why that is?

A. During the course of negotiations it was discussed that, and a point was brought up by myself that after reviewing the prior agreement to this agreement, it spelled out the S & A benefits and the number of weeks allowable.

Judge Ricci: What does the word S & A mean?

The Witness: Sick and Accident benefits, Your Honor.

[p. 14] Mr. Heyert: Your Honor, I don't know what the witness is referring to when he refers to this agreement.

Judge Ricci: I know what it is and I'll clarify it. I notice this exhibit number three says November 1st, 1974.

The Witness: Yes.

Judge Ricci: I take it that when I look at it, it will say that it was in effect on November 1st 1974 to October 31?

The Witness: October 31st, 1977.

Judge Ricci: It was a three-year contract?

The Witness: Yes.

Judge Ricci: And there was another three-year contract that preceded this one?

The Witness: Yes.

Judge Ricci: And you are saying that this one in effect at the time of the strike, did not deal with hourly paid employees, is that what you are telling me?

The Witness: There is no language in this agreement, that's right.

Mr. Heyert: Your Honor, someone who I've never seen before just came in.

Mr. Flint: That's one of our employees, one of our Board agents.

[p. 15] Judge Ricci: Did you ask him why this contract does not deal with hourly paid people?

Mr. Flint: That's right.

Judge Ricci: Can you answer that question?

The Witness: Yes, Your Honor, during the course of the negotiations—

Judge Ricci: Negotiations for what?

The Witness: For a new agreement.

Judge Ricci: When?

The Witness: From September of 1977 up through—

Judge Ricci: Wait a minute, this contract was in effect for three years?

The Witness: Yes, Your Honor.

Judge Ricci: It doesn't say anything about hourly paid people?

The Witness: No, it doesn't.

Judge Ricci: The question is, why does this contract not talk about them?

The Witness: Because it was an oversight on the part of the company when the agreement was printed up, that it was omitted.

Judge Ricci: You're saying that in 1974, when this booklet was printed, the company forgot to put part of the contract in the book?

The Witness: Yes, Your Honor.

[p. 16] Judge Ricci: Do you have the contract which has that in it?

The Witness: Yes, Your Honor.

Mr. Flint: Please mark this for identification as General Counsel's exhibit four.

(The document above referred to was marked General Counsel's Exhibit No. 4 for identification.)

Judge Ricci: All right, there has been marked for identification General Counsel's exhibit number four and it says on the face, September 1, 1971. Now, Mr. Witness, is this the contract that was in effect for the three years before 1974?

The Witness: Yes, Your Honor.

Judge Ricci: Is it okay to take this?

Mr. Flint: General Counsel moves for the admission of the contract.

Mr. Heyert: I don't understand the materiality of it, or the relevancy and for that reason I object to it.

Judge Ricci: I will receive into evidence, General Counsel's exhibit number four.

(The document above referred to as General Counsel's Exhibit No. 4 was received into evidence.)

Judge Ricci: Now, is it your story, Mr. Witness, that when the Union and the Company signed the [p. 17] 1974-1977 contract, something that had been agreed between the parties in negotiations, just was accidentally omitted from the contract?

The Witness: This is what was told to the Union by company representatives, that it was omitted in the printing of the book.

Judge Ricci: Do me a favor, listen to me, this is a printed booklet and in my experience it means that it is a print of the original contract that was signed between the Union and the Employer, that's what all collective bargaining agreements are, and this is a print of something else, is that correct?

The Witness: Yes, Your Honor.

Judge Ricci: Are you saying that the contract that was actually signed by the UAW and the Company in 1974, did have provisions for hourly wage people but when somebody decided to have a little booklet made, they accidentally left out what was in the original signed contract, is that what you are saying?

The Witness: Indirectly, Your Honor, I was not a part of the negotiations.

Judge Ricci: He can't testify about it. What else do you want to ask him, Mr. Flint?

Mr. Ladov: May we go off the record?

Judge Ricci: Yes, off the record.

[p. 18] (Discussion off the record.)

Judge Ricci: On the record.

Sir, will you please state the agreement of the parties?

Mr. Heyert: Wasn't that on the record?

Judge Ricci: No, that was not on the record.

Mr. Heyert: I understand that the parties have agreed, from the off the record discussion, it is my understanding from discussions among myself and Counsel for General Counsel and Counsel for Charging

Party, that the penultimate paragraph on page sixty nine of General Counsel's exhibit four, was inadvertently omitted and really is a part of the agreement in evidence as General Counsel's exhibit number three.

Judge Ricci: Do you agree to the stipulation, Mr. Flint?

Mr. Flint: Yes.

Judge Ricci: Mr. Ladov?

Mr. Ladov: Are we referring to the paragraph that states up to 60%?

Judge Ricci: I'll tell you what it is, the penultimate paragraph on page sixty six of G.C. four, or rather page sixty nine.

Mr. Ladov: Yes, the Union agrees.

Judge Ricci: Then it's a fact on this record.

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BEFORE THE NATIONAL LABOR RELATIONS BOARD

SIXTH REGION

Case Number 6-CA-10781

In the Matter of:

E. L. WIEGAND DIVISION, EMERSON ELECTRIC CO.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 1020

National Labor Relations Board
8th Floor, Porter Building
Hearing Room #1, 601 Grant Street
Pittsburgh, Pennsylvania.
January 11, 1979.

Met pursuant to adjournment at 9:00 o'clock a.m.

BEFORE:

HONORABLE THOMAS A. RICCI, ADMINISTRATIVE LAW JUDGE.

APPEARANCES:

ROBERT FLINT, Esquire, 10th Floor, Porter Building, 601 Grant Street, Pittsburgh, Pennsylvania 15219, appearing on behalf of the General Counsel.

MARTIN D. HEYERT, Esquire, Kelley, Drye & Warren, 350 Park Avenue, New York, New York 10022, appearing on behalf of the Respondent.

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[transcript page 140]

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Whereupon, LEONARD W. McELHINNEY was called as a witness by and on behalf of the Respondent, and having been duly sworn, was examined and testified as follows:

Judge Ricci: Have a seat.

Your full name please?

The Witness: Leonard W. McElhinney.

Judge Ricci: Please spell your last name?

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[p. 154] Mr. Heyert: It doesn't, it does not speak for itself on this point.

Judge Ricci: What's your question to him?

Mr. Heyert: What benefits does the policy pay.

Judge Ricci: Not the written one?

Mr. Heyert: The written ones.

Judge Ricci: Well, if it's not written in the written one, how can he tell you?

Mr. Heyer: He knows, he happens to be the vice president of industrial relations.

Judge Ricci: How could it be anything except what's written, if that's the policy?

Mr. Heyert: The benefits are actually spelled out in the collective bargaining agreement.

Judge Ricci: How can he add to it, or subtract from it.

Mr. Heyert: I just wanted to have coherent.

Judge Ricci: I beg your pardon?

Mr. Heyert: Never mind, I'll get to it another way.

Q. (By Mr. Heyert) Would I be correct in saying that General Counsel's exhibits 2, which is the collective bargaining agreement dated February 28th, 1978, and 4, which is the collective bargaining agreement dated [p. 155] September 1, 1971, set out the amounts, and the length of time for the A & S benefits to be paid?

A. Yes, they do.

Q. And I would also be correct in saying that the conditions for receiving benefits are set out in the policy, is that not so?

A. Yes, that's correct.

Q. And that's respondent's exhibit 5 for identification.

I want to call your attention to Section 3, page four, do you have that before you, Mr. McElhinney?

A. Yes, sir.

Q. And this Section 1.31 spells out the circumstances and the conditions precedent that have to be met before A & S benefits get paid, to bargaining unit members, is that not so?

A. Yes, that's so.

Mr. Heyert: I would like to offer Respondent's exhibit 5 in evidence.

Mr. Flint: Objection.

Judge Ricci: Wait a minute, I'll take it.

(The document heretofore marked Respondent's exhibit No. 5, was received in evidence.)

Judge Ricci: Mr. Heyert?

[p. 156] Mr. Heyert: Yes, sir.

Judge Ricci: Is the collective bargaining agreement that was in effect at the end of the strike, the one that ended?

Mr. Heyert: The one at the end of the strike, or the one—

Judge Ricci: May I ask, there's a contract that's an exhibit, that was in effect ended on October 31, 1977, does that refer or reference in any way to this document, you have had marked as number 5?

Mr. Heyert: It does not—

Judge Ricci: Stop.

Mr. Heyert: It doesn't refer to anything about A & S your Honor.

Judge Ricci: You are doing it again.

Mr. Heyert: What, excuse me?

Judge Ricci: The contract that expired on October 31, is GC's exhibit 3, and it talks about sick leave benefits?

Mr. Heyert: It doesn't, the A & S benefits were omitted inadvertently.

Judge Ricci: Stop.

Mr. Heyert: You have to go back to the '71 contract.

Judge Ricci: Stop. I will receive into evidence [p. 157] Respondent's exhibit number 5.

I can't help commenting that the contract in effect is the contract that covers the relationship between Employer and employee, as the exclusive bargaining agents.

Are there any other questions?

Mr. Heyert: Yes.

Q. (By Mr. Heyert) Would I be right in saying Mr. McElhinney, or would you tell me Mr. McElhinney, whether or not a person who becomes sick or injured while on leave of absence receives A & S benefits?

Judge Ricci: Just a minute.

Mr. Flint: Objection.

Judge Ricci: You mean a goes on vacation?

Mr. Heyert: Yes.

Judge Ricci: While he's on vacation he get sick, you are asking him whether he gets benefits or not?

Mr. Heyert: Yes.

Judge Ricci: Is there a question to him, how he reads the contract?

Mr. Heyert: No.

Judge Ricci: Well, then I don't want to hear it, because the General Counsel's theory is, these people entitled to money under the contract, they put [p. 158] them into evidence, either were or they weren't under the contract, you want your witness to talk about rules this company has, and have nothing to do with Union or with the contract, apart from union representation.

I will tell you now, I will pay no attention to them.

Mr. Heyert: Your Honor, as you well know, and as the Steelworkers' trilogy cases made clear, many terms and things, in terms of the relationship between the Union and the Employer that do not get—

Judge Ricci: Forgive me, I reverse—I overrule myself, ask him anything you want.

Q. (By Mr. Heyert) If an employee represented by Local 1020 is on a leave of absence, and become sick or injured, tell me what benefits, what A & S benefits he receives?

A. He would receive none.

Q. What about vacations?

A. He would receive none.

Q. And what's the practice with respect to lay-offs?

Judge Ricci: If he gets hurt while he's on vacation, he doesn't get it?

The Witness: That's correct.

Judge Ricci: Okay.

[p. 159] Q. (By Mr. Heyert) Lay-offs?

A. Because of sloppy administration, we have found cases where people have collected A & S benefits, while on lay-off, but that should not be.

Q. Please tell me whether or not, under the Accident and Sickness policy, I don't recall whether I offered—

Judge Ricci: I received it into evidence, Respondent's exhibit number 5.

Mr. Heyert: Yes, thank you.

Q. (By Mr. Heyert) Tell me whether or not employees in the bargaining unit represented by Local 1020 may accumulate A & S benefits from year to year?

Mr. Flint: Objection.

The Witness: No, they do not.

Q. (By Mr. Heyert) If an employee terminates and has not used all or any part of A & S benefits, what payment if any, does he receive with respect to that?

A. He does not receive any.

Q. Do benefits accrue under this policy?

Mr. Flint: Objection.

The Witness: No, they do not.

Judge Ricci: I think the General Counsel will agree with the next question you haven't asked yet.

If a man goes on strike, and he's out on strike [p. 160] on the sidewalk for a whole month, and then gets sick, does he get A & S benefits under the contract, and I think the witness' answer would be no.

I think the General Counsel will agree to that too?

Mr. Flint: Yes.

Judge Ricci: Are there any other questions of this witness?

Mr. Heyert: Yes.

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Excerpts from Collective Bargaining Agreements

AGREEMENT

Between

E. L. WIEGAND DIVISION
EMERSON ELECTRIC
COMPANY

and

UNITED AUTOMOBILE
WORKERS OF
AMERICA

LOCAL 1020

SEPTEMBER 1st 1971

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Early Retirees: Early retirees shall receive a term life insurance policy in the amount of $2,000 plus an option to purchase an additional $3,000 of coverage at the Company's group rate at the time of early retirement. This option shall remain in effect until the early retiree reaches age 65, at which time it shall be cancelled and $2,000.00 Paid-Up will remain in effect.

Early Retiree/Health Care: All early retirees and their spouse shall be covered by the Blue Cross-Blue Shield 21-90 Health Plan and the cost of such coverage shall be paid by the Company.

Blue Cross & Blue Shield and **Major Medical coverage** shall be extended to cover students to age 23. In addition, all handicapped and retarded children shall be covered regardless of age.

Payments under Blue Shield coverage for physicians and surgeons will be on the "Prevailing Fee" basis.

Weekly Accident & Sickness benefit shall be equal to 60% of an employee's gross average earnings per hour for a 40 hour week, including night shift premium, and shall be payable to a maximum of 39 weeks.

"It is the intent of the parties to this Agreement that all negotiated wage improvements and benefit programs shall become effective on September 1, 1971 and September 1 of each successive year. However, such effective date shall be subject to present and future Presidential Orders and/or other government regulations."

AGREEMENT

Between

E. L. WIEGAND DIVISION
EMERSON ELECTRIC
Co.

and

UNITED AUTOMOBILE
WORKERS OF
AMERICA

LOCAL 1020

FEBRUARY 28, 1978

• • •

(l) Consultations, limited to one consultation per consultant during any one period of hospitalization, when the subscriber is an in-patient and his dental condition requires such consultation.

(m) Effective February 28, 1979—New dentures covered at 80%.

(n) Effective February 28, 1980—Repair of dentures are covered for normal wear.

Section 5: Major Medical, Blue Cross/Blue Shield

Effective February 28, 1978 Major Medical, Blue Cross/Blue Shield to continue to the end of the month following the month of layoff.

Section 6: Audiometric

Effective February 28, 1980 benefits will be provided for Audiometric Testing.

Section: 7: Accident Sickness Insurance Hourly Employees

Weekly Accident & Sickness benefits shall be 60% of an eligible employee's average weekly earnings payable for a maximum of 39 weeks.

ARTICLE 44—RETIREE BENEFITS

Section 1: Pension A Normal Retirement

For participants retiring on or after March 1, 1978 (also, effective March 1, 1978, applicable to participants who retired on or after Nov. 1, 1977, but prior to February 28, 1978) $9.25

For participants retiring on or after March 1, 1979 ... $9.50

Basic Benefit—Present Retirees
March 1, 1978 ..... $ .25

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SUPPLEMENT TO AGREEMENT DATED FEBRUARY 28, 1978

It is expressly understood and agreed that because of the length of the strike, existing inventory, the transfer of tools, dies, equipment etc., work-in-process material and raw material during the strike to other Company plants, and the need to complete at these plants existing customer orders in process, there will be substantial delays in returning to work those bargaining unit employees for whom there eventually will be work. During the first two (2) months following resumption of production at the Pittsburgh Plant after the strike, employees shall be recalled to the jobs they were performing when the strike began, on an "as needed" basis to the Company, according to an employee's job classification seniority only and the bumping and plant-wide seniority provisions of the contract shall not apply. After two months, employees shall be returned to work on an "as needed" basis to the Company according to plant-wide seniority.

Effective beginning March 1, 1978 the Company will provide insurance pursuant to the terms of the labor contract for bargaining unit employees who return to work and who otherwise are eligible for such insurance. For bargaining unit employees for whom there will be work after the resumption of production and whose return to work is delayed following resumption of production after the strike, the Company will provide Blue Cross/Blue Shield, Major Medical and Life Insurance (such employees may obtain optional life insurance by proper application and payment) provided they are otherwise eligible for such insurance.

It is understood and agreed that following resumption of production and after the strike, Air Heaters (RS, RSF, CHF and CHT) will no longer be made at the Pittsburgh Plant or Monroeville facility, but will be made at other Company plants in exercise of Company management

rights. Substantial, but not all, water heater production will be temporarily resumed at Pittsburgh. It is understood that the Company presently plans to relocate all water heater production at some future date. This expression of intent is not to diminish in any way the Company's right to move other products during the term of the contract pursuant to ARTICLE 19, Section 1(a) and ARTICLE 39, section 13 (b).

It is further understood and agreed that the tools, dies, assembly fixtures and benches, and various other miscellaneous items that were moved out of the Pittsburgh Plant and Monroeville facility to other Company plants during the strike in January and February 1978 shall be returned to the Pittsburgh Plant and Monroeville facility as soon as practicable after the strike ends, but only after runs, for existing customer orders, at such other Company plants now using such tools, dies, etc. are completed, and such return shall be subject to the right of the Company to exercise its management rights under ARTICLE 19 Section 1(a) and ARTICLE 39, Section 13 (a) during the term of the new labor contract.

It is further understood and agreed that all pending grievances, charges, civil and/criminal proceedings arising out of or in relation to actions taken or occurring during the strike, including those relating to actions or proceedings

brought by or against individuals, shall be withdrawn with prejudice or the parties shall cause them to be so withdrawn. The Company will take no disciplinary action against any strikers for alleged picket line misconduct or seek damages or other relief from the Union for such conduct or arising out of or in connection with the strike. The Union and its members will take no retaliatory actions against non-bargaining unit employees for their activities during the strike or seek damages or other relief (including filing grievances) from the Company arising out of or in connection with the strike.

Employee Benefit Plan, Section One

EMERSON ELECTRIC CO. BENEFIT PLAN

SECTION ONE: GENERAL INFORMATION

1.0 Intent of Section One:

Section One of this Plan sets forth the general concepts embodied in the Plan, relating to its relationship to the trust used to fund the Plan, the obligations of the Participating Employers and Participants to make contributions to the Plan and the management of the Fund. In addition, Section One explains how the Plan can be amended or terminated; identifies certain persons required to be identified by ERISA; enumerates the classifications of Participants; sets forth the claims procedure to be used by Participants; and for cross reference purposes, contains the definition of certain terms used in the Trust, Funding Agreement, and other Sections of the Plan.

• • •

1.31 Totally Disabled and Total Disability

The terms "totally disabled" and "total disability" mean that the family member, if an employee, is prevented, solely because of injury or disease, from engaging in his regular or customary occupation and is performing no work of any kind for compensation or if a dependent is prevented, solely because of injury or disease, from engaging in substantially all of the normal activities of a person of like age and sex in good health.

Letter from a Representative of Wiegand to a Representative of Union

CHROMALOX

November 18, 1977

Mr. Joseph Scarfi
International Representative
U.A.W., Region 2-A
300 Penn Center Boulevard
Suite 107
Pittsburgh, Pennsylvania 15235

Dear Mr. Scarfi:

This will confirm our discussions at Tuesday's meeting, November 15, and your subsequent telephone conversations with John Dwyer concerning the status of insurance coverage for Wiegand employees in the bargaining unit.

You will recall that on October 31 in connection with our discussions leading to the current impasse and strike, the Company accepted the Union's offer to continue during the strike Blue Cross, Blue Shield, Major Medical, Life Insurance, and Accident & Sickness coverage for bargaining unit employees, the cost of which the Union would reimburse the Company. To this end on October 31 the Company reduced this agreement to a writing and handed it to you, which you were then going to review with the Union's Benefits Specialist.

Thereafter, you informed us that the Union would not sign the insurance agreement, but that the Union would itself

provide at its own expense Blue Cross, Blue Shield, Major Medical and Life Insurance coverage for bargaining unit employees, effective as of November 1, 1977. I believe you are fully aware that relying on this information we have advised our carriers to stop billing us for any such coverage from November 1, 1977, pending the cessation of the strike. You and the Local's counsel, Mr. Wilner, also told us it was the Union's belief that the Company had the legal obligation to continue during the strike the weekly accident and sickness indemnity benefits to those employees in the bargaining unit who were receiving such benefits before the strike began. Our counsel advises us the Company has no obligation to make such payments during the strike for the very reasons the National Labor Relations Board set forth in *Southwestern Electric Power Company*, 216 NLRB 522 (1975), which are applicable here, and accordingly, the Company has not and does not intend to continue such payments during the strike. As you know, I gave both you and Mr. Wilner the name and citation of the *Southwestern* case. I also said the Company certainly intended to meet its legal obligations and believed it had concerning accident and sickness benefits, and to date the Company has not received from you or from any representative on behalf of the Union any case or other authority contrary to the *Southwestern* case.

We clearly understand and rely on your representations to us this week confirming that your Benefits Specialist has been in touch with Don Kapinski, Representative of Blue Cross and Blue Shield, and that the International Union, U.A.W., will assume the responsibility and pay directly

retroactively to November 1, 1977, premiums for Blue Cross and Blue Shield coverage for bargaining unit employees, and further that the International Union, U.A.W., through Nationwide Insurance Company will provide at its own expense Major Medical and Life Insurance coverage for bargaining unit employees retroactively to November 1, 1977.

We understand, however, that the Union will not provide any of the coverage described in the preceding paragraph for those employees in the bargaining unit who were receiving weekly accident and sickness indemnity benefits when the strike began, in addition to not providing such employees with weekly accident and sickness benefits. We remind you that the Company has no obligation to do so and will not, and we believe the Union's position in differentiating among employees in the same bargaining unit is improper. We will, however, make available through our carriers coverage to those employees, for whom the Union is not providing coverage, at the employee's individual expense. Please notify these employees of this, and if any are interested, please let me know or have them contact Mr. John Dwyer directly at the Plant.

It is also clearly understood that dental insurance will not be provided for bargaining unit employees during the strike, either by the Company or the Union. If individual employees wish to pay for such insurance on an individual basis, the Company will attempt to make arrangements with the carrier.

If you have any questions concerning anything contained in this letter, please promptly advise us.

Sincerely,

/s/ L. W. McElhinney
L. W. McElhinney
Vice President
Industrial Relations

/mr

Bureau of National Affairs Survey

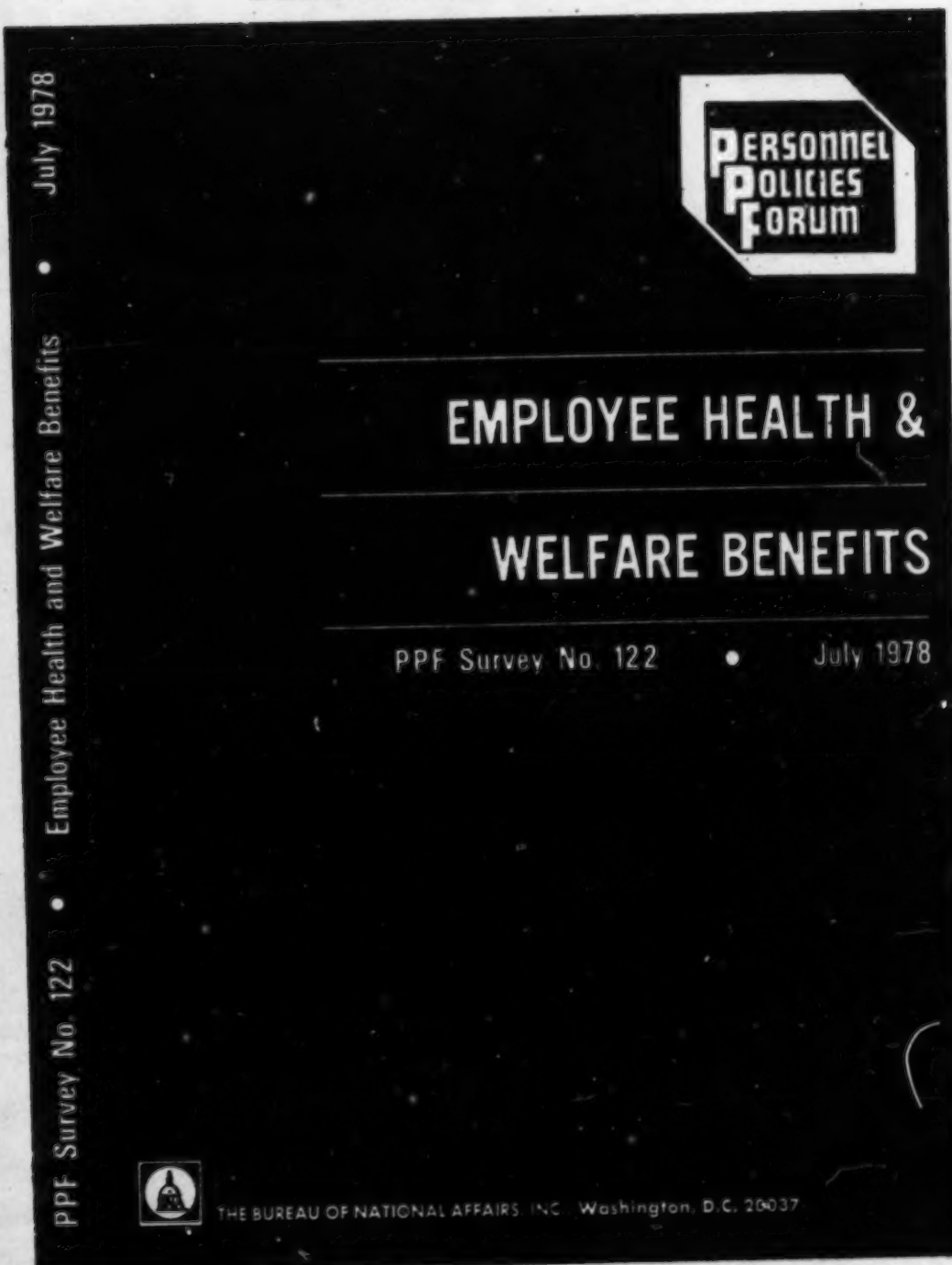

TABLE 5 -- GROUP LIFE INSURANCE: COST TO EMPLOYER

	Range				
	Low	First Quartile	Median	Third Quartile	High
Monthly premium per employee					
Dollar amount: *					
Office	$0.70	$1.65	$4.37	$9.00	$20.35
Plant	$0.70	$1.67	$4.24	$8.30	$14.88
Managerial	$0.50	$2.00	$4.87	$9.71	$23.40
Cost per $1,000 of coverage: **					
Office	6¢	28¢	43¢	55¢	93¢
Plant	10¢	30¢	43¢	55¢	93¢
Managerial	6¢	28¢	43¢	55¢	93¢

*Figures provided by 35 companies.
**Figures provided by 65 companies.

Here is an example of the life insurance costs at a small western manufacturing company:

Basic Annual Earnings	Life and AD&D Benefit	Employer Pays
Less than $6,000	$5,000	$1.35 per month
$6,000 but less than $11,000	$15,000	4.05
$11,000 but less than $15,000	$30,000	8.10
$15,000 but less than $20,000	$45,000	12.15
$20,000 or more	3 times salary	17.35

A few companies have plans combining life and health insurance and pay one premium for the total package. One firm pays $58.09 per employee per month for such coverage, and another pays $59.46. Two PPF companies have one plan including life insurance, sickness and accident benefits, and medical insurance, for which the premium is $125 per month per employee.

DISABILITY BENEFITS

Most companies provide two types of benefits for employees unable to work because of illness or accident: the first are sickness and accident (S&A) benefits to provide a continuation of income for short term disabilities; and the second are long term disability (LTD) benefits to provide payments in the case of permanent disability or one lasting a matter of years.

As indicated by the figures in Table 6, more than two thirds of the PPF companies have S&A benefit plans for all three employee groups. Plant employees are more likely to be covered by these benefits than the other two employee groups; however, plant employees are less likely to have paid sick leave benefits. (Such benefits are not included in the figures in Table 6. See PPF Survey No. 111, Paid Leave & Leave of Absence Policies, November 1975.) In some companies with paid sick leave, S&A benefits also become payable when a disabled employee's accrued sick leave is used up.

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C TABLE 6 -- DISABILITY BENEFITS

Type of Benefits Employee Group Covered	% of Companies					
	By Industry			By Size		All Companies
	Mfg.	Nonmfg.	Nonbus.	Large	Small	
Short Term Sickness & Accident (S&A)						
Office	80	66	53	68	71	70
Plant	86	70	51	74	72	73
Managerial	71	65	53	66	63	65
Long Term Disability (LTD)						
Office	75	73	45	68	66	67
Plant	36	70	41	45	41	43
Managerial	86	85	68	75	83	81

LTD benefits cover office employees in 67 percent of the PPF companies, plant employees in 43 percent, and managerial employees in 81 percent. As noted earlier, the number of LTD plans, which was too small to be included in the 1969 survey, has nearly doubled since the 1974 survey. Some respondents note that they have no separate LTD insurance benefits because their retirement plans provide benefits for total disability. In companies with both S&A and LTD benefits (45 percent of the total sample), the two plans usually mesh so that if the maximum duration of S&A benefits is 26 weeks, the same period of time is the waiting period before LTD benefits are payable.

For both types of disability benefits, there usually is a provision that any payments an employee is entitled to under Workers' Compensation insurance (WC) will be deducted or there is a provision that disabilities covered by WC are not eligible for coverage under the LTD plan.

Short Term Sickness and Accident Benefits

Data on features of short term S&A benefit plans are shown in Table 7. Because the same S&A [provisions apply to all three] employee groups covered in the survey in the majority of companies, data are not provided by employee group (see footnote to Table 7).

Length of service requirements for S&A coverage are three months in one fourth of the companies with such benefits, one month in nearly one fourth (23 percent), and in another 23 percent, coverage begins the first day of work. The major difference in service requirements among employee groups is that in a number of companies with a one to three month wait for coverage for most employees, the managerial group is covered as of the date of hire.

Permanent part-time employees are eligible for S&A coverage in 40 percent of the PPF companies. Differences between employee groups in this regard are few--one PPF company has S&A coverage for part-time plant employees but not office personnel; two companies cover office part-timers but not part-time plant workers; and one company covers part-timer managerial personnel but not plant or office employees.

Benefit amounts are a uniform flat sum in 29 percent of the companies with S&A plans. These amounts range from $25 to $175 a week, with about half of them falling below $100 a week. In one PPF company, the benefits are based on labor grades, with "lower labor grades 1 through 4 receiving $65 a week, middle labor grades 5 through 7--$85 a week, and top grade levels 8 through 12--$115 a week."

A graduated benefit amount, usually a percentage of regular pay, is found in 67 percent of the companies, and in nearly 30 percent of these companies the benefit equals regular pay. (Graduated benefits equal to regular pay apply more frequently to office and managerial groups than to plant employees.)

TABLE 7 -- SICKNESS AND ACCIDENT BENEFITS

	% of Companies with S&A Benefits*					
	By Industry			By Size		All Companies
	Mfg.	Nonmfg.	Nonbus.	Large	Small	
Length of service required for S&A coverage **						
First day of work	23	18	32	24	23	23
One month or first of month after hire	31	11	9	20	25	23
Two months	10	0	5	3	10	7
Three months	21	25	36	25	25	25
Six months	9	21	14	17	8	13
One year	4	25	4	8	10	9
Varies	2	0	0	3	0	1
Permanent parttime employees are covered	27	61	55	53	28	40
Benefit amount is-- ***						
Uniform flat sum	44	8	9	27	31	29
Less than $100 per week	19	4	9	12	15	13
$100 per week or more	20	4	0	11	13	12
Not specified	5	0	0	4	3	4
Graduated amount	54	82	86	71	62	67
50% of regular pay or less	6	11	27	10	11	11
55% to 75% of regular pay	20	18	27	17	23	21
100% of regular pay	13	32	27	24	16	20
Varies/not specified	16	25	5	19	11	15
Waiting period before benefits begin--**						
None	16	25	50	27	21	24
Five days or less	19	18	9	13	16	15
7 or 8 days	56	32	23	46	43	45
Other/not specified	9	25	18	13	20	17
Waiting period waived in case of accident or hospitalization	59	29	23	41	49	45
Maximum duration of benefits--**						
13 weeks	17	14	23	17	18	18
26 weeks	59	46	32	42	59	51
39 weeks	1	0	0	2	0	1
52 weeks	13	18	18	22	8	15
Other	10	18	18	17	10	13

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TABLE 7 (CONT'D)

	% of Companies					
	By Industry			By Size		All Companies
	Mfg.	Nonmfg.	Nonbus.	Large	Small	
Pregnancy-related disabilities are covered	59	61	55	63	54	58
Employees share in the cost	19	11	14	15	16	16
Benefits are self-insured	9	29	14	15	13	14

* In the majority of companies with S&A benefits, the same provisions apply to all three employee groups covered in this survey. For purposes of this table, data for the plant/service group were used where there are differences from one group to another; the difference are discussed in the text.
**Percentages may add to more or less than 100 because of rounding.
***Percentages may not add to 100 because of nonresponses.

Waiting periods before benefits begin are found in about three fourths of the S&A benefit plans, with the most common waiting period being 7 or 8 days. In some companies, employees must exhaust any accrued sick leave before S&A benefits are payable. At one PPF company there is a three-day waiting period that "applies to first year employees only."

Maximum duration of benefits is 26 weeks in about one half the S&A benefits plans; 13 weeks is the period of payment in 18 percent, and payments may continue for a full year in 15 percent. One company's plan pays for 24 months, another has no specified limit, and another provides benefits "until return to work." A large northern manufacturing company has a 26-week maximum for under two years of service, 52 weeks for over two years, and 104 weeks for over 20 years.

Pregnancy-related disabilities are covered by S&A benefits in 58 percent of the companies with such plans. One respondent notes that this provision applies only to operations in New York State, under the provisions of the state temporary disability law.

Costs of S&A benefit plans were provided by 34 respondents; they range from $1.20 to $31.10 per employee per month, with a median of $9.57 per month. Half of the figures fall between $4.56 per month and $16.33 per month. S&A benefits are self-insured in 14 percent of the companies providing such benefits.

As indicated by the figures in Table 7, employees pay part of the cost of S&A benefits in about one sixth of the companies with such benefits. In all of these companies, the employee share is 40 percent or less of the cost, except in three companies where employees pay the entire cost. Several PPF members note that in states with temporary disability laws, employees contribute through payroll taxes. In New York State, for example, the contribution is 1/2 of one percent of the first $6200 of annual earnings.

Benefit amounts are related to length of service in several PPF companies, and some plans specify a maximum benefit payment. The following are examples of some of the variations in S&A benefits:

- Benefits are approximately 60% under set schedule according to earnings. Above $15,000/year, the maximum remains at $175/week. (Small northern manufacturing company)
- S&A benefits of 50% of regular pay supplemented by employee's available sick leave to 100% salary level for a period of one week to 18 weeks based on employee's length of service. (Large central insurance company)

- Benefits are a percentage of the employee's salary with a maximum benefit payable. The plan pays 50% up to $541/month. Employees may purchase supplemental coverage. (Large western educational institution)

- Graduated schedules: minimum for 6 months service, half pay for 52 weeks; maximum over 25 years service, 52 weeks full pay. (Large central utility)

- One week at full pay for each year of service, two-thirds pay thereafter. (Large western insurance company)

Long Term Disability Benefits

The major provisions of LTD benefit plans are summarized in Table 8. As indicated in the footnote to Table 8, in companies with LTD benefits, the same plan covers all employee groups.

Length of service requirements for LTD coverage tend to be longer than for other types of insurance benefits, with 17 percent of the companies not offering LTD until employees have been with the company for a full year and a few companies requiring two, three, or five years of service. In the majority of companies, however, employees are covered within the first three months of employment, and in more than a fourth (27 percent) they are covered immediately upon hire.

Permanent part-time employees are covered in 30 percent of the companies with LTD plans. This is a smaller percentage than for other insurance benefits. The greatest difference is in the nonbusiness category; part-time employees are covered by LTD in only 15 percent of the nonbusiness organizations with such benefits, compared to 50 percent or more of the nonbusiness organizations that cover part-timers for life, S&A, and health insurance benefits.

Maximum benefit amounts payable under the LTD plans range from 55% to 66 2/3% of the employee's regular pay in two thirds of the companies, and in one fifth, the benefit is 50 percent or less of regular pay. Often the percent of pay used as the benefit amount varies, depending on factors such as salary level or length of service, and the plan at one PFF company pays "65% for first year of disability, 50% in successive years." One personnel executive notes that at his company "the LTD benefit is coordinated with all other group disability or retirement benefits so that total income does not exceed 2/3 of salary."

The smallest LTD benefit reported is 40 percent of pay, and two companies provide a benefit of 100 percent of pay.

Waiting periods before benefits begin are a feature of all but 3 percent of the LTD plans, with six months being the most common. (Nearly one half the plans call for a six months waiting period -- figures in Table 8 include four companies with a five month waiting period and one company with seven months.) In 28 percent of the plans, the waiting period is 90 days, and it is a full year 6 percent. One respondent notes that the waiting period varies to correspond with the expiration of S&A benefits, which are based on the employee's length of service.

The maximum duration of benefits is until the employee is eligible for retirement benefits in more than four fifths of the plans. In the majority of plans this is specified as age 65, while a few specify age 62. In 8 percent of the plans, benefits are unlimited in duration or payable for "lifetime." Payment of LTD is limited to five years in two companies, seven years in another, and the duration varies depending on length of service in another. At one PPF company, benefits are paid for lifetime if the disability is the result of an accident and to age 65 if illness is the cause.

Employees share in the cost of LTD benefits in 42 percent of the companies, and in nearly one half these companies, employees pay the full cost as an optional fringe benefit.

Monthly costs of LTD insurance were provided by 66 respondents, or 52 percent of those whose companies provide such benefits. The majority (71 percent) of the figures provided are on the basis of a percent of monthly salary or cents per $100 of salary or company payroll. These figures range from 4¢ per $100 to $1.34/100, with a median of .50/100; one half the figures fall between 36¢ and 68¢ per 100. Under some plans, there is an experience factor so that the rate changes each year based on the previous year's benefits paid.

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TABLE 8 -- LONG TERM DISABILITY BENEFITS

Length of service required for LTD Coverage	% of Companies with LTD Benefits*					
	By Industry			By Size		All Companies
	Mfg.	Nonmfg.	Nonbus.	Large	Small	
First day of work	29	24	23	27	27	27
One month or first of month after hire	19	18	4	17	15	16
Two months	9	0	4	2	10	6
Three months	10	24	19	10	21	16
Six months	9	18	15	12	13	13
One year	16	12	23	21	10	17
2 - 5 years	3	4	4	4	1	2
Other/not indicated	5	0	8	4	3	3
Permanent parttime employees are covered	21	61	15	38	22	30
Maximum benefit amount payable is--						
50% or less of regular pay	19	21	23	30	12	20
55% to 66 2/3%	71	70	54	55	79	68
70% to 80%	6	9	8	7	7	7
100%	3	0	0	2	1	2
Other/not specified	1	0	15	6	1	4
Waiting period before benefits begin--						
None	3	3	4	3	3	3
30 to 60 days	9	6	4	7	8	8
90 days	22	21	54	20	36	28
5 to 7 months	54	55	38	53	49	51
One year	6	12	0	12	1	6
Other/not specified	6	3	0	1	3	4
Maximum duration of benefits--						
Unlimited/lifetime	7	9	8	10	7	8
Age 65	82	70	73	84	70	77
Age 62	1	6	4	2	4	3
Until normal retirement age or eligible for Social Security benefits	3	6	4	2	6	4
Other/no response	7	9	11	5	13	8
Employees share in the cost	50	45	15	43	40	42
Employees pay:						
100% of cost	22	24	8	27	13	20
70% to 80%	1	9	0	3	3	3
50% or less	18	6	8	8	16	13
Other/not indicated	9	6	0	5	8	6

* In all the PPF companies with LTD benefits covering more than one employee group, the same plan covers all eligible employees. The only difference is that in four of the 127 companies with LTD plans, managerial employees are covered as of the day they are hired while nonmanagerial employees have a waiting period, ranging from 30 days to 5 years; in one company managerial employees have a waiting period of 30 days, and the waiting period for nonmanagerial employees is 60 days.

Dollar amounts per employee per month for LTD benefits range from $1.80 to $12.20; the median is $4.60, and half the figures are between $3.53 and $6.06. One respondent provided both types of figures saying that the monthly dollar amount of $9.79 per employee is the "actual cost based on 21¢ per $100 monthly insured payroll up to $2,083 maximum monthly insured amount."

The cost varies, depending on salary level, in a few companies. At a large northern bank, for example, employees earning up to $550 per month pay 9.9¢ per $100 of monthly earnings and employees earning over $550 a month pay 23.8¢ per $100 of monthly earnings. At a small western research firm, the cost is $4.20 per month for employees with a salary under $625 and $6.50 per month for salaries over $625.

A small western manufacturing company has one plan that provides both short and long term disability benefits, for which the company pays $30 per month per employee.

STATUTES

§§ 8(a)(3), 10(a), (c), (e) and (f) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(3), 160(a), (c), (e), (f)

§ 158 Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a

labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

• • •

§ 160 Prevention of unfair labor practices

Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

• • •

Reduction of testimony to writing; findings and orders of Board

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the

said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after servive thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * *

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining

order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that th. order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as to modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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Opposition

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No. 81-841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

E. L. WIEGAND DIVISION, EMERSON ELECTRIC CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL 1020,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION FOR UAW LOCAL 1020

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Third Circuit properly exercised its reviewing authority, enforced the Board's finding that Wiegand violated § 8(a)(1) and (3) of the Act by withholding accrued disability benefits from employees because others lawfully engaged in a strike, and modified the decision to require Wiegand to pay such benefits during the entire term of the employees' disability?

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IN THE

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OCTOBER TERM, 1981

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E. L. WIEGAND DIVISION, EMERSON ELECTRIC CO.,
Petitioner,

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NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL 1020,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION FOR UAW LOCAL 1020

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 1020,[1] by counsel, respectfully prays that the Court *deny* the Petition for Writ of *Certiorari*.

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[1] Hereafter referred to as the "UAW" or "Union". Petitioner E. L. Wiegand Division is hereafter referred to as "Wiegand" or "the Company."

OPINIONS BELOW

The opinions below are reported at: *E. L. Wiegand Division, Emerson Electric Co. v. NLRB*, 650 F.2d 463 (3d Cir. 1981), 107 LRRM 2112, 91 CCH Lab. Cas. § 12,720; and *E. L. Wiegand Division, Emerson Electric Co.*, 246 NLRB No. 162(1979), 103 LRRM 1073.[2]

COUNTERSTATEMENT OF THE CASE

During 1977, UAW and Wiegand engaged in negotiations for a new labor agreement to replace the 1974-1977 agreement expiring on October 31, 1977. Unable to come to terms with the Company, UAW called a strike which began at contract expiration, and extended until February 28, 1978.

On October 31, 1977, 23 of 1,100 unit employees were on disability leave, were physically unable to work, and were receiving contractual disability (S&A) benefits. Under the 1974 labor agreement, these benefits were payable for periods up to 39 weeks. Contrary to Wiegand's assertion here, it conceded before the Third Circuit that "seniority measures . . . the length of an employee's [disability] benefits."[3]

At the final pre-strike negotiations, Wiegand threatened to cut off disability benefits for the 23 disabled employees if the Union struck, claiming it was not "obligated to pay strikers to support the strike . . ." Wiegand made this threat despite the Union's protest that the 23 disabled workers "were not participants in any forthcoming strike . . ." and that the benefits were due these employees under the contract.[4]

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[2] The Third Circuit modified its opinion on August 3, 1981. The Third Circuit's opinion and modification are reprinted in the Appendix to Wiegand's Petition, hereafter "W. App."

[3] W. App. 34-35.

[4] W. App. 4, 26, 27, 49, 65.

Despite UAW's protest, Wiegand immediately cut off the disability benefits when the strike began, before it could determine whether the disabled workers ratified the strike action, and before it could determine how effective the strike was in keeping employees away from work.[5] The benefits remained suspended until the strike ended. UAW loaned the 23 discriminatees sufficient money to make up for their lost disability benefits.[6]

During the strike, several disabled employees contacted Wiegand to inquire why their benefits had been cut off, and complained that they were not participants in the strike. In each instance, they were informed by Wiegand representatives that the benefit cut off would continue, in line with "company policy."[7] Some employees who recovered from their disability during the strike properly notified Wiegand of this fact. Others remained disabled, some as continuing hospital patients, until the strike's end.[8]

Several of the disabled employees appeared at the picket line or the Union's office at different points during the strike. Wiegand, however, made no distinction based on this fact, and continued to withhold disability benefits from all 23 disabled workers.

The Board's Administrative Law Judge (ALJ) found Wiegand's actions violative of § 8(a)(1) and (3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158 (a)(1) and (3). The ALJ rejected Wiegand's claim that appearance by disabled employees on the picket line gave Wiegand a right to cut off benefits, since disabled employees are by definition not able to work and are thus not able to withhold services—the statutory pre-

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[5] W. App. 15, 26-27, 65.

[6] W. App. 5, 57-58.

[7] W. App. 5, 27-28, 56-57.

[8] W. App. 5, 49, 51-52.

requisite for striker status. The ALJ further found Wiegand's actions were motivated by anti-union animus. Accordingly, the ALJ ordered Wiegand to reimburse employees for accrued disability benefits withheld from them during the strike, to the extent they were eligible for them.[9]

The Board affirmed the ALJ's decision, adopting his finding that Wiegand was motivated by anti-union animus. In so finding, the Board relied on the fact that Wiegand cut off disability benefits before the strike began and before it could possibly know how effective the strike was, or whether disabled employees supported the strike. However, the Board, Member Jenkins dissenting on this point, found Wiegand privileged to cut off employees' accrued benefits when they publicly indicated support for the strike.

The Third Circuit found substantial evidence to support the Board's findings, and enforced the Board's order. Relying especially on the finding of anti-union animus, the court held this case distinguishable from a prior Board decision in *Southwestern Electric Power Co.*, 216 NLRB 522 (1975), where animus was absent.[10] However, the Third Circuit found the Board's decision to allow withholding of accrued benefits from disabled employees who publicly supported the strike contrary to this Court's decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), and its progeny, as well as to the Board's own finding that the disability benefits here were accrued.[11] Accordingly, the Third Circuit modified

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[9] The parties agreed below that the question of whether the employees continued to be disabled during the strike was properly left to the compliance stage of the Board's proceeding for resolution. (W. App. 5 n. 2, 51).

[10] W. App. 20, 26-27.

[11] W. App. 9-10, 23, 30-31.

the Board's order, and required Wiegand to pay disability benefits to the 23 discriminatees for the term of their disability.

SUMMARY OF ARGUMENT

Certiorari should be denied. The Third Circuit followed this Court's decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) and enforced the Board's finding that Wiegand unlawfully withheld accrued benefits from disabled employees because others engaged in a strike. This precludes any claim that the Third Circuit and Board broke new ground and required Wiegand to "finance" the strike against itself.

The Board's refusal to apply a prior decision, distinguishable both legally and factually, does not merit review. In any case, Wiegand was not prejudiced, since the order imposes no penalties, but requires Wiegand to pay benefits it was contractually obligated to provide.

Nor does the Third Circuit's refusal to find the Board without jurisdiction merit review, despite the alleged requirement of a private agreement between UAW and Wiegand that the charge here be withdrawn. Section 10(a) of the Act makes it clear that such private agreements cannot divest the Board of jurisdiction or legitimate unfair labor practices.

Certiorari is not warranted by the Third Circuit's modification of the Board's legal conclusion on one point, and a corresponding extension of the remedy ordered by the Board. The Third Circuit did not usurp the Board's authority by making its own legal finding, and acted on an issue previously determined by the Board.

ARGUMENT

I

Thanks to this Court's decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), the guideposts for the issue presented here are clearly established. As this Court held in *Great Dane Trailers*, an employer violates the NLRA when it withholds accrued employee wages and benefits in retaliation for protected employee activity, including strikes. The Board and the courts have had no difficulty following this well established principle. *See Allied Industrial Workers Local 289 v. NLRB*, 476 F.2d 868, 877-878 (D.C. Cir. 1973). *NLRB v. Jemco, Inc.*, 465 F.2d 1148, 1151-1152 (6th Cir. 1972), *cert. denied*, 409 U.S. 1109; *NLRB v. Frick Co.*, 397 F.2d 958 (3d Cir. 1968); *Indiana and Michigan Electric Co.*, 236 NLRB 986 (1973), *enforced without opinion*, 610 F.2d 812 (4th Cir. 1979).

On the other hand, the Board's decisions make it clear that employers are not required to pay wages or benefits during a strike when they have not been previously earned or accrued. *General Electric Co.*, 80 NLRB 510 (1948); *Towne Chevrolet*, 230 NLRB 479 (1977) (insurance policy premiums); *Ace Tank and Heater Co.*, 167 NLRB 663 (1967) (medical insurance premiums). There is no serious dispute as to these standards.[12]

Wiegand's quarrel arises here from its claim that the Board and the Third Circuit both found improperly, on the facts, that the benefits here were not "wage substitutes" but were accrued, due and payable to the 23 disabled employees prior to the beginning of the strike. Wiegand thus claims (Pet. 13-14) that this Court should grant review because the Board and the Third Circuit allegedly misunderstood certain contractual language. Yet Wiegand conceded the opposite as to that language

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[12] W. App. 11, 30.

below, before both the Third Circuit and the Board.[13] Wiegand's contradictory assertions therefore raise only evidentiary issues which do not warrant review by this Court. *Universal Camera Corp v. NLRB*, 340 U.S. 474, 490-491 (1951); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498-502 (1951).

Also without merit is Wiegand's claim that the Third Circuit's decision should be reviewed because it "upsets the balance of bargaining power between labor and management" (Pet. 14-19). The decision below is entirely consistent with the principle, followed at least since *Great Dane Trailers*, that an employer violates the Act by refusing to pay already existing debts to employees (i.e. accrued benefits earned before a strike) because they withhold services and lawfully strike. And, as *Great Dane Trailers* and its progeny hold, such conduct violates the Act even absent specific evidence of anti-union animus. Thus, the finding here, that Wiegand's conduct was motivated specifically by anti-union animus, even more strongly supports the conclusion that Wiegand violated § 8(a)(1) and (3) of the Act.

The Board cases which Wiegand claims are to the contrary (Pet. 14-15), are not. In each such case, the employer lawfully withheld benefits attributable only to service *during a strike*, when such service was *withheld*.[14] Wiegand's claim that payment of the disability benefits here require it to "finance" the strike has no more validity than the claim, rejected by this Court in *Great Dane Trailers*, that payment of pre-strike vacation pay requires such "financing."

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[13] See p. 2, *supra*.

[14] This distinction is well established in labor relations law, and is evidenced here by the fact that UAW offered to pay current Blue Cross/Blue Shield health insurance premiums for strikers while they struck. (W. App. 4, 11).

Nothing in the decisions below unbalances the bargaining power of labor and management, since the Company is not required to pay for benefits not already earned before the strike.[15] Nor is there any merit to Wiegand's claim that "the Third Circuit's decision adds to the growing conflict among the circuits as to which employee benefits cannot be withheld during a strike because they are vested or accrued." (Pet. 19). Both cases cited by Wiegand to support the existence of this "conflict", *Buchholtz v. Swift & Co.*, 609 F.2d 317, 326-327 (8th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980) and *Schneider v. Electric Auto-Lite Co.*, 456 F.2d 366, 372 (6th Cir. 1972), have nothing to do with unfair labor practices, or with strikes and the denial of benefits. Both cases involve plant closings and fact-specific contract interpre-

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[15] Wiegand's reliance on certain arbitration decisions does not support the view that this case raises an important issue for labor relations. As a complete review of arbitration decisions in this area indicates, arbitrators have reached differing conclusions as to whether labor contracts require payment of benefits to employees during strikes, layoffs, or other work stoppages. *See, Teledyne Monarch Rubber Co.*, 57 LA 845 (D. Kabaker, 1971) (payment of accident benefits to employee who sustained injury during strike is required); *Reliance Universal, Inc.*, 57 LA 337 (J. Sembower, 1971) (employer required to pay sick leave benefits to employee whose sickness coincided with strike, despite employee's refusal to cross picket line after sickness ended); *Hubbell Metals, Inc.*, 68 LA 762 (B. Marcus, 1977) (employer required to pay insurance benefits to employees during contract reopener strike). *See also, Hobart Corp.*, 74 LA 1061 (A. Wolk, 1980); *Rack Engineering Co.*, 76 LA 1013, 1015 (S. Sargent, 1981). As these cases and the cases cited by Wiegand indicate, the outcome in each case depends on the particular facts, the particular language of the contract, and other matters peculiar to that case. Thus, the particular findings and contract interpretation here do not warrant review by this Court, since the issues involved are fact-specific and bear only upon the relationship between Wiegand and UAW, and not on any greater issue of importance to the public. *NLRB v. Pittsburgh S.S. Co.*, *supra*, 340 U.S. at 502.

tations as to benefit eligibility. If these cases indicate anything, it is the unsurprising fact that the outcome of each case will depend on the particular facts and contract language at issue.[16]

II

Contrary to Wiegand's argument (Pet. 24-26), the Third Circuit properly found the Board did not abuse its discretion in ordering Wiegand to pay employees their contractual disability benefits, despite the Board's prior decision in *Southwestern Electric Power Co.*, 216 NLRB 522 (1975). Wiegand mistakenly claims that retroactive application of newly adopted administrative rules or interpretations is *per se* arbitrary. Instead, "retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 203 (1947). *See also, NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-295 (1974). And, as the Third Circuit has noted, "agency decisions having a *retroactive* effect . . . have generally been sustained." *NLRB v. Q-T Shoe Mfg. Co.*, 409 F.2d 1247, 1251-1252 and n.20 (3d Cir. 1969).

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[16] Wiegand also claims that this Court should grant review because the Board and the Third Circuit are now in "conflict" on the question of whether accrued benefits can be denied disabled employees when they show public support for the strike. (Pet. 10) Conflict between the Board and a Court of Appeals, but not between the various Circuits, is not a basis for granting *certiorari*. If it were, this Court would be required to grant review in every case where a court of appeals disagreed with the Board, since such an appellate reversal by definition means the court and the Board are "in conflict." Of course, this Court does not apply such a test. And in any case, the Board's decision in *Walter Motor Truck Co.*, 256 NLRB No. 166 (July 1, 1981) is not in conflict with the decision of the Third Circuit here. In *Walter Motor* there was no showing that the employees involved gave public support for the strike while still disabled, and the Board so found, not addressing, other than in dictum, the issue raised by the Third Circuit's modification of the Board decision here. (256 NLRB No. 166, sl. op. at 8.)

The Third Circuit correctly found that even if the Board's order were considered a retroactive application of a changed interpretation, the impact of that application here would not be inequitable.[17] Wiegand has not been subjected to any fines or penalties, but is merely being required to pay an accrued benefit, a form of deferred compensation for service it has already received. Rather than resulting in a windfall to employees, the order here does no more than prevent an unjust enrichment to Wiegand by its retention of benefits it already owes its employees.

In any event, this case is factually distinguishable from *Southwestern Electric*, as the Third Circuit and the Board both recognized. In *Southwestern Electric*, there was no indication, as here, that the benefits withheld were accrued. 216 NLRB at 524. Rather, as the Board's ALJ recognized, the facts here are more analogous to those in the Board's decision in *Indiana and Michigan Electric Co.*, 236 NLRB 986 (1978), enforced without opinion, 610 F.2d 812 (4th Cir. 1979), where the Board found the employer unlawfully withheld leave pay due workers on the basis of work performed before the strike started.

Moreover, as the Third Circuit held, this case is distinguishable from *Southwestern Electric* because of the Board's finding that Wiegand acted here with anti-union animus and the specific intent to coerce and restrain protected employee activity. Such a finding was not made in *Southwestern Electric*.[18]

Finally, Wiegand here ignored Union and employee protests that the disabled employees were not participants in the strike, unlike the employer in *Southwestern Electric*. These facts negate any claim by Wiegand that this Court should grant review merely because the Board

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[17] W. App. 18-19, 28.

[18] W. App. 20, 26-26, 65-66. See also *Pease Corp.*, 237 NLRB 1273 (1978).

chose this case as a vehicle for abandoning its prior position in *Southwestern Electric.*

III

The refusal of the Board to grant Wiegand's motion to dismiss the complaint on the basis of the "strike settlement" agreement likewise does not warrant review by this Court. Under § 10(a) of the NLRA, 29 U.S.C. § 160(a), the Board has the exclusive power to adjudicate unfair labor practices. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-437 (1967); *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940). Thus, as the Third Circuit held here, "[b]y well established principle, private contracts may not be used to legitimate unfair labor practices, nor to divest the Board of jurisdiction over such practices. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967). *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944)." [19]

This principle was properly applied by the Board and the Third Circuit here, as it has been on prior occasions, to nullify agreements between employers and unions to prohibit the filing of unfair labor practice charges,[20] and agreements compromising employee remedial rights under the NLRA.[21] Similarly, this principle has been applied to nullify agreements by an employer and/or union to withdraw their respective unfair labor practice charges and election objections, and to permit the parties to file new charges with the Board concerning the same unfair labor practice issues.[22]

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[19] W. App. 8.

[20] *Lodge 743, IAM v. United Aircraft Corp.*, 337 F.2d 5, 8-11 (2d Cir. 1964), *cert. denied*, 380 U.S. 908.

[21] *International Union of Electrical, Radio and Machine Workers, Local 613 v. NLRB*, 328 F.2d 723, 727 (3d Cir. 1964); *NLRB v. Ideal Donut Shop*, 347 F.2d 498, 499 (7th Cir. 1965); *NLRB v. Threads, Inc.*, 308 F.2d 1, 8 (4th Cir. 1962).

[22] *NLRB v. My Store, Inc.*, 345 F.2d 494, 496-497 (7th Cir. 1965), *cert. denied*, 382 U.S. 927; *NLRB v. T.W. Phillips Gas & Oil Co.*, 141 F.2d 304, 305-306 (3d Cir. 1944).

The asserted "strike settlement" agreement here totally deprives the employees of any compensation for Wiegand's unlawful refusal to pay accrued disability benefits. Nor does the asserted agreement recognize that the Company breached the requirements of the Act, or contain a promise by the Company to refrain from such conduct in the future. Finally, in addition to the disagreement between Wiegand and UAW as to whether the asserted agreement required the withdrawal of the charge here, it must be remembered that the agreement came, if at all, only after the end of a long strike tainted by Wiegand's unlawful attempt to coerce employees by cutting off earned benefits to those on sick leave. As the Third Circuit correctly held here,

> [T]he policy reflected in the precedent and expressed in section 10(a) [of the Act] prevents a party from engaging in unfair labor practices that may coerce a favorable labor agreement and then insulating itself from Board sanctions by exculpatory provisions in that agreement. The Board properly refused to dismiss the complaint . . . [W. App. 8.]

IV

No basis for granting review is presented by Wiegand's claim (Pet. 11-14) that the Third Circuit lacked authority to modify the Board's order here, without remanding the case to the Board. The Third Circuit modified the Board's order based on its finding that the Board erred as a matter of law in holding Wiegand privileged to cut off benefits to disabled employees when they publicly indicated support for the strike. The court then extended the *same remedy* ordered by the Board—repayment of withheld benefits—to those disabled employees who gave public support to the strike, consistent with the principles established by this Court in *NLRB v. Great Dane Trailers Co., supra.* The Third Circuit's action was consistent with its power under § 10(f) of the Act, 29 U.S.C. § 160(f) "to make and enter a decree

enforcing, modifying, and enforcing as so modified . . . the order of the Board . . .", if it finds a Board decision legally incorrect or unsupported by substantial evidence.

The cases relied on by Wiegand are inapposite. In both *South Prairie Construction Co. v. International Union of Operating Engineers*, 425 U.S. 800 (1976), and *NLRB v. Food Store Employees Union*, 417 U.S. 1 (1974), this Court found the Court of Appeals should have remanded to the Board, rather than making the *initial determination* on an issue never passed on by the Board. Both cases stand for the proposition that the Courts of Appeals should not usurp the Board's authority to make such an initial determination on any question within the scope of the Board's jurisdiction. Neither deprives the appellate courts of their jurisdiction to review and modify or reverse Board decisions or findings which are legally incorrect.

The Third Circuit's review of the Board's decision here was proper. The question on which the Third Circuit found the Board in error was fully discussed and considered by the Board and its ALJ. In fact, the Third Circuit's position on the issue in question is essentially the same as that of dissenting Board Member Jenkins and the ALJ, found by the court to be correct as a matter of law. The Board was not deprived of its authority to make the initial determination as to the legal question here. The Third Circuit disagreed on one point, and modified the order, consistent with its authority under § 10(f), by providing the same make whole remedy provided by the Board.[23] This legitimate exercise of ap-

[23] Unlike the District of Columbia Circuit in *NLRB v. Food Store Employees Union, supra*, the Third Circuit here did not order a new and different type of remedy from that imposed by the Board. In that case, the Court of Appeals wrongfully ordered, on its own, a reimbursement of litigation expenses remedy which the Board had announced for the first time, in a decision issued after the decision on review, that it would consider. The court applied the test newly mandated by the Board as to this remedy

pellate authority by the Third Circuit does not warrant review.

CONCLUSION

For the foregoing reasons, the Court should *deny* Wiegand's Petition for *certiorari.*

Respectfully submitted,

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December 4, 1981

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without giving the Board the opportunity to apply that test. Here, in contrast, the repayment of benefits remedy is a straightforward one, and the Third Circuit merely disagreed with the Board as to whether the employer continued to violate the Act, thus necessitating the remedy, after disabled employees publicly supported the strike. The court having decided the Board erred as a matter of law on this issue, there was nothing for the Board to do on remand, other than to apply the same remedy it had previously applied and that the Third Circuit had extended. Thus remand would have been "an unnecessary formality." *NLRB v. Food Store Employees Union, supra,* 417 U.S. at 8.

Opposition

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No. 81-841

In the Supreme Court of the United States

OCTOBER TERM, 1981

E.L. WIEGAND DIVISION, EMERSON ELECTRIC COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner terminated payment of accrued sickness and accident ("S & A") benefits to disabled employees in order to coerce and restrain strike activity.

2. Whether the court of appeals properly entered a remedial order modifying the order issued by the Board without remanding the case to the Board, where the Board had already fully considered the issue on which the court of appeals modified the Board's disposition, and the court's decision left nothing open for determination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) and its order amending the opinion (Pet. App. 33a-35a) are reported at 650 F. 2d 463 and 107 L.R.R.M. 3303 respectively. The Board's decision and order (Pet. App. 64a-77a) and the decision and order of the Administrative Law Judge (Pet. App. 46a-63a) are reported at 246 N.L.R.B. 1143.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1981 (Pet. App. 78a-80a). A petition for rehearing was denied on June 25, 1981 (Pet. App. 83a-84a), and an amended petition for rehearing was denied on August 4, 1981 (Pet. App. 87a-88a). On September 8, 1981, Justice

Brennan extended the time for filing a petition for writ of certiorari to November 2, 1981 (Pet. App. 89a), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to 1977 petitioner, a manufacturer of electrical appliances and components, entered into a series of collective bargaining agreements with respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 1020 ("the union"), covering the roughly 1100 employees employed at petitioner's Pittsburgh plant. Under a plan established by a 1971-1974 collective bargaining agreement, petitioner provided sickness and accident ("S & A") benefits to employees disabled by injury or disease. The plan provided for payments to disabled hourly employees of 60% of the employee's average weekly wages. "Disability" was defined to mean that an employee is "prevented, solely because of injury or disease from engaging in his regular or customary occupation and is performing no work of any kind for compensation * * *" (Pet. App. 3a-4a).

The 1974-1977 collective bargaining agreement between petitioner and the union expired on October 31, 1977. Negotiations aimed at reaching a new agreement were unsuccessful and the union called a strike to begin on November 1, 1977. As of October 31, some 23 unit employees were on disability leave and were receiving S & A payments (Pet. App. 3a-4a). On October 31, the parties agreed to continue various nonaccrued benefits during the strike, with the understanding that the union would reimburse petitioner. Petitioner proposed similar terms for continuation of S & A benefits, but the union objected to this proposal, stating that the employees on sick leave were not

participants in a strike and that petitioner had a legal obligation to continue making S & A payments. Petitioner responded that S & A payments would be halted "if [the Union] went out on strike" (Pet. App. 4a).

The union went out on strike as scheduled and petitioner immediately stopped all disability payments (Pet. App. 4a). The union protested petitioner's action, reiterating that the employees on sick leave were not participants in the strike. Petitioner also received protests from at least some of the disabled employees, who stated that they were not on strike (*id.* at 5a, 20a n.6). Petitioner did not resume payments to the disabled employees during the strike (*id.* at 6a). After the disabled employees were without S & A payments for six weeks, the union modified its policy against payment of strike assistance to employees on sick leave. Strike benefits were extended to such employees subject to the union's right to recoup the amounts paid from any award made against petitioner by the National Labor Relations Board resting on the termination of the S & A benefits (*id.* at 5a). The union filed such an unfair labor practice charge with the Board and a complaint ultimately issued on the basis of that charge (*id.* at 5a, 47a).

During the strike's four month duration, seven of the disabled employees sent medical certification to petitioner that they were recovered and able to return to work. Some others who were disabled as of October 31, 1977, were identified as participating in strike activity or publicly supporting the strike (Pet. App. 5a; see note 6 *infra*). The strike ended on February 28, 1978. Petitioner thereupon resumed payments of the S & A benefits to those employees who were still disabled (Pet. App. 6a). As part of the strike settlement, the parties agreed that "all pending grievances, charges, civil and/or criminal proceedings arising out of or in relation to actions taken or occurring during the strike * * * shall be withdrawn with prejudice or the parties shall cause them to be so withdrawn" (*id.* at 5a-6a).

2. The Board held that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act (29 U.S.C. 158(a)(1) and (3)) by terminating payment of S & A benefits to disabled employees in response to a strike by actively employed members of the union (Pet. App. 64a-69a).[1] The Board rejected petitioner's contention that the S & A benefits were wages, adopting the Administrative Law Judge's finding (Pet. App. 54a) that the benefits had accrued to the disabled employees as a result of "past work performed."[2] The Board further found that petitioner's termination of the S & A payments was "intended to coerce and restrain the protected union activity with respect to the strike, by imposing a sanction against certain unit employees if others in the unit engaged in strike activity" (Pet. App. 65a). The Board explained (*ibid.*):

> [W]e emphasize the fact that [petitioner's] declaration that these benefits would not be paid to employees who would otherwise receive them came at a time when a strike of its facility was imminent, but before there was any showing of how widespread the strike would be, and before [petitioner] was aware that any of the employees who were unable to work ratified or actively

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[1]As described below (page 6, *infra*), Member Jenkins dissented in part, deeming the remedy ordered by the Board unduly narrow. Member Penello dissented from the Board's order.

[2]The Administrative Law Judge explained that S & A payments "were not compensation for contemporaneous delivery of services" (Pet. App. 54a), noting that the duration of the S & A benefits paid was tied to the individual employees' length of service (*id.* at 55a).

In affirming the decision of the Administrative Law Judge (see Pet. App. 64a), the Board adopted his conclusion (*id.* at 58a-59a) that the provision of the strike settlement agreement requiring the parties to withdraw pending charges did not bind the Board to dismiss the pending charges.

> supported the strike. Furthermore, [petitioner] terminated these benefits immediately upon the commencement of the strike despite a union representative's clear protest that the individuals who were unable to work were not participants in any strike.[3]

The Board ordered petitioner to make whole the disabled employees whose S & A benefits had been cut off. The Administrative Law Judge's remedial order was modified, however, by excluding any period after an individual employee had actively participated in strike activity or publicly shown support for the strike from the computation of the award (Pet. App. 67a-69a). The Board reasoned: "[A]ny employee, disabled or sound, who affirmatively demonstrates his support of the strike * * * has enmeshed himself in the ongoing strike activity * * *" (*id.* at 67a). The Board concluded (*id.* at 68a):

> [W]hile employees have the protected right to receive disability benefits without disavowing the strike, an employer should not be obligated to finance a strike against itself, as would be the case if we ordered [petitioner] to pay such benefits for the period during which the disabled individuals participated in strike activity.

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[3]The Board also reappraised the policy of presuming that employees on sick leave support a strike enunciated in *Southwestern Electric Power Co.*, 216 N.L.R.B. 522 (1975), overruling the earlier decision to the extent inconsistent with the present decision (Pet. App. 65a-66a). The Board concluded that employees have the right, under Section 7 of the National Labor Relations Act (29 U.S.C. 157), to refrain from declaring a position on a strike while medically excused (Pet. App. 66a). Accordingly, the Board held (*ibid.*):

> [A]n employer may no longer require its disabled employees to disavow strike action during their sick leave in order to receive disability benefits. To allow the termination of such benefits to certain employees as a result solely of the strike activities of others is to penalize the employees who have not yet acted in support of the strike.

Member Jenkins dissented from the modification of the award (Pet. App. 70a-74a). In his view, S & A benefits "fully vested upon the commencement of the employee's actual disability" and "no event other than recovery * * * would terminate [petitioner's] fully vested obligation to continue such payments for all employees on disability prior to the strike" (*id.* at 70a). He also noted that petitioner's termination of the disabled employees' benefits may have led to their participation in the strike and argued that petitioner should not be permitted to profit from its unfair labor practice, *i.e.*, termination of the S & A payments (*id.* at 72a-74a).

3. The court of appeals found "substantial evidence in the record to support the finding of the Board that the [petitioner] committed an unfair labor practice in terminating S and A benefits to employees when the strike began" (Pet. App. 3a).[4] The court agreed that the S & A benefits were accrued benefits because they were tied to length of service (Pet. App. 11a-13a)[5] and that petitioner's termination of them was intended to restrain protected union

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[4]At the outset the court held that the Board had properly refused to dismiss the complaint on the basis of the strike settlement agreement, noting that "[t]he policy reflected in the precedent and expressed in section 10(a) prevents a party from engaging in unfair labor practices that may coerce a favorable labor agreement and then insulating itself from Board sanctions by exculpatory provisions in that agreement" (Pet. App. 7a-8a).

[5]Following denial of a petition for rehearing, petitioner filed an amended petition asserting, for the first time, that the payment period did not in fact vary according to an employee's length of service. In response, the court of appeals amended its opinion to observe that the ALJ's and the Board's finding that the payment period was tied to the length of an employee's service had never been challenged prior to petitioner's amended petition for rehearing and that, in its brief to the court, petitioner had "conced[ed] the nexus between the length of the benefits and the past services" (Pet. App. 33a-35a).

activity (*id.* at 9a-20a).[6] However, the court disapproved the Board's remedial order insofar as it excluded any period after an individual employee had participated in or publicly supported strike activities from computation of the award. The court stated that the Board's limitation on the payments was "internally inconsistent with the Board's own rationale in this case," that it "varie[d] from the Board's policies as set out in previous Board decisions, and frustrate[d] effectuation of section 7 rights" (Pet. App. 25a). The court explained (*id.* at 23a; citations omitted):

> The Board asserts that its remedy serves the well established policy of protecting an employer from financing a strike against itself. However, the entire basis of the Board's decision was that the S and A payments were to be considered as accrued benefits. Since an employer may not deny a striking employee accrued benefits, such as vacation pay, because of his or her active participation in a strike, it follows that the employer may not deny the S and A benefits merely because of the disabled employee's approval of or participation in strike activity. * * * [A]ccrued benefits * * * are payments for services the employer has already received. Even though such benefits, whether disability payments, vacation pay, or previously earned wages, may provide the living expenses of those who oppose the employer, they do not represent unfair

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[6] While recognizing that "[a]ctive participation in strike activity may be telling, or even presumptive, evidence of cessation of disability," the court noted that "whether such activity in fact reflects the end of the disability period may depend on the nature of the activity and the physical demands of the particular employee's job" (Pet. App. 25a). By agreement of the parties, resolution of these factual questions as to individual employees was left for administrative compliance proceedings (*id.* at n.2, 25a).

strike financing by an employer, and the Board may not justify its order on that basis.[7]

ARGUMENT

The decision of the court of appeals represents a correct application of settled legal principles to the facts of this case, and is consistent with applicable decisions of this Court and the other courts of appeals. There is accordingly no occasion for further review.

1. It is well settled that an employer's refusal to pay accrued benefits in consequence of an economic strike may be found to constitute an unfair labor practice under Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and 158(a)(3). *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *NLRB* v. *Erie*

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[7]The court of appeals also held that "[t]he fact that the Board has chosen this case as the vehicle for repudiating * * * *Southwestern Electric* cannot give [petitioner] any basis for complaint" (Pet. App. 20a; see note 3, *supra*). The court observed that *Southwestern Electric* was inapposite and distinguishable because in that case there was no indication that the sick pay was an accrued benefit, nor was there any finding, such as was made here, that the benefit termination was intended to have a coercive effect on exercise of rights protected by the National Labor Relations Act (Pet. App. 19a-20a). In any event, the court added (*id.* at 19a):

> [E]ven were the Board's order requiring payment of S and A benefits to those employees disabled during the strike to be considered as a retroactive application of a changed interpretation, we would not find its impact to be inequitable. The employer is merely being required to pay an accrued benefit, a form of deferred compensation for service it has already received. The effect therefore does no more than prevent unjust enrichment to an employer * * *.

The court accordingly concluded that under established precedent such application could not be considered impermissible (*id.* at 18a-19a). In addition, the court found that, even if petitioner could have justifiably relied on *Southwestern Electric*, the Board could properly conclude on the record that petitioner had not in fact done so (*id.* at 16a).

Resistor Corp., 373 U.S. 221 (1963); *Allied Industrial Workers, Local Union 289* v. *NLRB*, 476 F. 2d 868, 875-876, 878 (D.C. Cir. 1973); *NLRB* v. *Jemco, Inc.*, 465 F. 2d 1148, 1151-1152 (6th Cir. 1972), cert. denied, 409 U.S. 1109 (1973); *NLRB* v. *Frick Co.*, 397 F. 2d 956, 961 (3d Cir. 1968); *Indiana & Michigan Electric Co.*, 236 N.L.R.B. 986 (1978), enforced, 610 F. 2d 812 (4th Cir. 1979), cert. denied, 447 U.S. 923 (1980). Petitioner does not directly challenge this principle, but seeks to avoid it by arguing (Pet. 14-19) that the Board has unlawfully compelled payment of the functional equivalent of wages to employees during a strike. Petitioner's contention, however, necessarily challenges the sufficiency of the evidence in the record to support the Board's findings, upheld by the court of appeals, that the S & A benefits were accrued, and that petitioner cut off these payments to coerce and restrain protected concerted activity. Further review of these fact-bound determinations is not warranted. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, there is ample support for both of these findings.[8]

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[8]No issue warranting this Court's review is raised by petitioner's contention (Pet. 21-24) that the Board and the court of appeals improperly proceeded on the merits rather than dismissing the case—and thereby enforcing the parties' strike settlement agreement which required withdrawal of pending charges. As the court of appeals recognized (Pet. App. 8a), the Board's refusal to dismiss was properly based on the "well established principle [that] private contracts may not be used to legitimate unfair labor practices nor to divest the Board of jurisdiction over such practices. *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967); *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944)."

Petitioner's reliance (Pet. 23) upon *Retail Clerks International Association, Local Unions Nos. 128 and 633* v. *Lion Dry Goods, Inc.*, 369 U.S. 17 (1962), is misplaced. That case simply holds that Section 301(a) of the Labor-Management Relations Act, 1947, 29 U.S.C. 185(a), confers jurisdiction on the federal courts to entertain suits based on

a. Contrary to petitioner's assertion (Pet. 13-14), the S & A benefits at issue were not wages, based on services currently rendered, but were accrued benefits based on an employee's prior service. In finding that "[t]he S and A benefits in this case have the distinguishing characteristic of accrued benefits," the court of appeals accepted the finding of the Board and the ALJ that "the right to and the total amount of benefits are tied to the duration of past services and the wages paid for them" (Pet. App. 12a). The court added that, while the S & A benefits here were "conditional" in that "the employee [must] suffer[] and continu[e] to suffer a disabling illness or injury, they [did] not depend on any return to work or on any future services to the employer" (*ibid.*). Petitioner's challenge to the court of

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strike settlement agreements, and does not address the effect upon Labor Board jurisdiction of an agreement requiring withdrawal of charges.

Nor does *Gulf States Manufacturers, Inc.* v. *NLRB*, 579 F. 2d 1298 (5th Cir. 1978), advance petitioner's argument (Pet. 22-23). We note that the opinion cited by petitioner was superseded upon rehearing en banc. *Gulf States Manufacturers, Inc.* v. *NLRB*, 598 F. 2d 896 (5th Cir. 1979). *Gulf States* is distinguishable for there the Regional Director of the NLRB had approved a stipulation between the parties requesting withdrawal of the pending charges with prejudice, but the Board later issued a complaint when the withdrawn charges were resubmitted. 598 F. 2d at 899. The en banc court stressed that the "agreement between employer and union was not a private deal, off in limbo and unrelated to the Board." *Id.* at 902. The en banc court also recognized that the Board has broad discretion to proceed upon an unfair practice charge even where a party has formally requested its withdrawal, *id.* at 903—a circumstance which is lacking here.

Board decisions described by petitioner (Pet. 23) as "uph[o]ld[ing] similar amnesty language in other strike settlement agreements" are readily distinguishable. In *Stationary Engineers, Local 39*, 240 N.L.R.B. 1122 (1979), and *Retail Clerks Union Local 1364*, 240 N.L.R.B. 1127 (1979), the Board found that a union's discipline of its members was an unfair labor practice in light of an amnesty agreement protecting members against otherwise permissible discipline, thereby vindicating both the settlement agreement and its own authority to prevent unfair labor practices.

appeals' decision rests largely on its claim that the Board and the court of appeals were incorrectly informed as to the operation of the S & A benefits plan (Pet. 13-14). Petitioner does not deny that it failed to raise this fundamental contention at any stage of these proceedings prior to filing of an extraordinary amended petition for rehearing en banc. See note 5, *supra*. Petitioner's tardy argument respecting this factual matter accordingly cannot be entertained here. See Section 10(e), 29 U.S.C. 160(e); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311 & n.10 (1979); see also *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Further review would be particularly inappropriate where, as here, petitioner "conced[ed] the nexus between the length of the benefits and the past services" in its brief filed in the court of appeals (Pet. App. 35a).[9]

b. Equally insubstantial is any challenge to the Board's determination that petitioner intended to coerce and restrain protected concerted activity by cutting off S & A benefits.[10] As the court below noted (Pet. App. 15a): "The context of the employer's decision as conveyed in the final negotiation session"—including the timing of its announcement that the payments would be terminated, and the fact

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[9]There is simply no relationship between the scope of the remedial order as to which petitioner argues a remand to the Board was required (Pet. 11-13), and the factual question as to the operation of the S & A plan. Thus, even if remand were required for the purpose suggested (but see pages 14-15, *infra*), the Board would have no occasion to "make additional findings" respecting the operation of petitioner's plan, notwithstanding petitioner's effort (Pet. 13) to link these issues.

[10]Although it did not rely on any such conclusion, the court of appeals aptly observed, "[w]here, as here, the employer's action affected a benefit that could amount to as much as 45% of an employee's annual income, one might argue that it is so destructive of important rights that subjective intent could be deemed irrelevant" (Pet. App. 14a). Under such circumstances no proof of subjective antiunion motivation is required to sustain the unfair labor practice charge. *NLRB* v. *Great Dane Trailers, Inc.*, *supra*, 388 U.S. at 33.

that it cut off the payments despite the union's protest that the disabled employees were not participants in any strike—"adequately supports the Board's conclusion that antiunion motivation was present." The Board's finding of unlawful motivation is further buttressed by record evidence that petitioner "attempted to use its threatened cutting off of disability benefits to secure concessions from the union on the conduct of the strike, and itself brought up the question of these benefits at the last bargaining session without any earlier indication of its position that these were not in fact accrued benefits" (Pet. App. 15a n.3).

Petitioner's contention (Pet. 15-16, 19-21) that its termination of S & A benefits was justified because the "100% effective strike" eliminated available work at the plant does not withstand scrutiny. Petitioner cut off the payments *before* it knew how effective the strike would be. Moreover, the benefit plan did not make petitioner's obligation to provide S & A payments conditional on the availability of work. As the court below noted, "[t]he plan defines disability in terms of the employee being prevented from engaging in his or her 'regular and customary occupation' because of illnesss or injury. This definition turns on the physical capacity to carry on one's occupation" (Pet. App. 13a). The court further noted that "nothing in the record of this case indicates that the benefit plan contemplated that employees who were incapable of performing their usual occupations for the employer would not be deemed disabled for the purposes of receiving benefits" (*ibid.*).[11] This factual

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[11]The record does not support petitioner's reliance upon an alleged "past practice of not paying S [and] A benefits during other times employees are not at work" (Pet. 20). Although the evidence indicates that petitioner did not pay S & A benefits to employees who became ill or disabled while already on vacation or leave of absence (Pet. App. 102a-103a), it does not establish that petitioner cut off vested S & A benefits from employees actually receiving them. The record does show, moreover, that petitioner, through what it characterized as

determination is plainly correct and does not warrant review by this Court.[12]

c. Petitioner's assertion (Pet. 19) that the instant decision "adds to the growing conflict among the circuits as to which employee benefits cannot be withheld during a strike because they are vested or accrued" is without foundation. Neither *Buchholtz* v. *Swift & Co.*, 609 F. 2d 317 (8th Cir. 1979), cert. denied, 444 U.S. 1018 (1980), nor *Schneider* v. *Electric Auto-Lite Co.*, 456 F. 2d 366 (6th Cir. 1972), conflicts with the principle that refusal to pay accrued benefits in the event of a strike may constitute an unfair labor practice. Rather, each case presents a question of contract interpretation as to whether vacation benefits were due and payable despite the affected employees' failure to satisfy the precondition that they be on the active payroll on a critical

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"sloppy administration," did in fact pay S & A benefits to employees on layoff (Pet. App. 103a).

[12]Petitioner further claims (Pet. 24-26) that its conduct was immunized under the policy adopted in *Southwestern Electric Power Co.*, 216 N.L.R.B. 522 (1975), and that the Board's retroactive application of a new policy in the instant case raises an issue warranting review. That question is not presented on this record. The court of appeals correctly recognized that *Southwestern Electric* is distinguishable from this case and properly held that reliance thereupon was unwarranted and that no question of retroactive application need be decided (Pet. App. 16a-17a, 19a-20a; see note 7, *supra*). In any event, as the court of appeals also recognized (Pet. App. 18a-19a), retroactive application would not be impermissible in this case. An agency such as the Labor Board may properly balance the effects of retroactivity against the need to effectuate the policies of the statute. See *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294-295 (1974). For the reasons stated by the court of appeals, retroactive application of the Board's policy, if such it was, worked no inequity or hardship against petitioner.

date, where plant closure prevented employees from meeting that requirement.[13] By contrast, here, the dispute centers on termination of benefits to individuals already receiving them occasioned by the advent of a strike by other employees.

2. Petitioner also contends (Pet. 11-13) that the court of appeals abused its reviewing function by entering a remedial order modifying the Board's order rather than remanding the case to the Board for issuance of an order consistent with the court's opinion. In the circumstances of this case, however, the court's modification of the Board's order did not require a remand.

The court concluded (Pet. App. 23a-25a) that the Board's remedial order conflicted with its own reasoning and holding insofar as it excluded from computation of the award any period after which an individual employee had publicly supported the strike.[14] Petitioner has suggested no material factual finding that could have been made upon remand and has identified no matter of policy or law that would

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[13]The court held in *Buchholtz* that the employees were not eligible for vacation benefits under the terms of the contract (609 F. 2d at 326), while the court in *Schneider* found employees were entitled to pro-rated vacation benefits under the contract because "it was the [employer's] action in closing the plant" that made employment on the eligibility date impossible (456 F. 2d at 372). Any conflict between those decisions is not presented here.

[14]"The only remedial order consonant with the finding that the S & A benefits were accrued is one that directs the employer to pay these benefits for the entire time a worker remains disabled" (Pet. App. 31a; Adams, J., concurring).

have remained open upon remand. See note 9, *supra*.[15] In these circumstances, no discretionary action remained to be taken, and no purpose would be served by remanding the case to the Board solely to reform the order to conform to the opinion of the court of appeals.[16]

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[15]Plainly, the Board could not have declined to abide by the court of appeals' mandate in this case as petitioner seems to suggest (Pet. 13).

[16]The cases cited by petitioner (Pet. 11-13) involve distinguishable situations. See *South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers*, 425 U.S. 800, 803-806 (1976) (court of appeals invaded Board's statutory province when it proceeded to decide the Section 9 unit question in the first instance); *NLRB* v. *Food Store Employees Union, Local 347*, 417 U.S. 1 (1974) (court of appeals erred in enlarging Board's order to encompass policy enunciated subsequent to Board's decision without allowing the Board an opportunity to determine whether new policy should be applied retroactively); *FPC* v. *Idaho Power Co.*, 344 U.S. 17 (1952) (court of appeals erred in modifying license by striking conditions attached to it where agency might have withheld consent to any license rather than issue modified license). In contrast, in this case no discretionary actions remained to be taken; the court of appeals modified the Board's order only insofar as it reversed the Board's considered disposition of the particular remedial question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81-841

IN THE

Supreme Court of the United States

October Term, 1981

E. L. WIEGAND DIVISION,
EMERSON ELECTRIC CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) LOCAL 1020,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner, E. L. Wiegand Division, Emerson Electric Company ("Wiegand") submits this brief to advise the Court of the Third Circuit's recent decision in *Vesuvius Crucible Co.* v. *NLRB,* —— F.2d ——, 108 LRRM 3209 (November 30, 1981), decided after Wiegand filed its petition for a writ of certiorari, which is contrary to the Third Circuit's decision in this case, and to reply to UAW Local 1020's ("Local 1020") and the National Labor Relations Board's ("Board") briefs in opposition to Wiegand's petition.

Reasons for Granting the Writ

I

The Third Circuit's recent decision in *Vesuvius Crucible Co.* v. *NLRB*, —— F.2d ——, 108 LRRM 3209 (November 30, 1981) directly conflicts with its decision in this case.

After the Third Circuit sustained the Board in finding that Wiegand violated the Act, it again addressed the issue of whether employers may stop employee benefits after a collective bargaining agreement expires and an economic strike against the employer begins in *Vesuvius Crucible Co.* v. *NLRB, supra.* This time it reversed the Board. The Third Circuit's decision in *Vesuvius Crucible* conflicts with its decision in this case and adds further uncertainty as to whether or not an employer may withhold benefits lawfully from its employees during an economic strike.

The employer in *Vesuvius Crucible* refused to pay vacation benefits to its employees after the employees struck when their union's collective bargaining agreement with the employer expired. The employer, like Wiegand, told the union that it was not legally obligated to pay vacation benefits to its employees during the strike since vacation benefits are not accrued benefits, and, as here, the employer sent the union a letter outlining its legal position concerning the payment of benefits during the strike. 108 LRRM at 3210. The Board disagreed with the employer, found that the vacation benefits set forth in the expired collective bargaining agreement were accrued benefits, and, as in this case, concluded that the employer had violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act

("Act"), 29 U.S.C. §§ 158(a)(1), 158(a)(3), because it withheld accrued benefits from its employees. *Id.**

When the employer petitioned to review the Board's erroneous findings, the Third Circuit correctly refused to enforce the Board's order because:

> in formulating its own interpretation of the contract the Board overstepped its authority and seriously misperceived its role. 108 LRRM at 3212.

Unfortunately, the Third Circuit did not apply the same logic set forth in its subsequent decision in *Vesuvius Crucible* to Wiegand even though the Board's conclusion in *Vesuvius Crucible* that the benefits at issue there were accrued and the factual setting in which the Board reached that conclusion are identical to those in this case.** Put another way, the rationale of its decision in *Vesuvius Crucible* required the Third Circuit to have reversed the Board in *Wiegand*. However, the Third Circuit made a futile attempt to distinguish *Wiegand* from *Vesuvius Crucible* by asserting that Wiegand terminated Sickness and Accident ("S&A") benefits to its employees at the expiration of its collective bargaining agreement with Local 1020 *solely* because of its alleged antiunion motivation. 108 LRRM at 3211. This attempted distinction is frankly

---

* Significantly, the Board in *Vesuvius Crucible*, as in this case, did not rely upon the employer's motivation in finding that the withholding of accrued employee benefits during a strike is an unfair labor practice.

** The Third Circuit's decision in this case also conflicts with the First Circuit's decision in *NLRB* v. *Borden, Inc.*, 600 F.2d 313 (1st Cir. 1979) *on remand*, 248 NLRB 387 (1980) *enforced*, 645 F.2d 87 (1st Cir. 1981). In *NLRB* v. *Borden, Inc.*, 600 F.2d at 321 the First Circuit similarly rejected the Board's claim that an employer's reliance upon its interpretation of its contractual obligations in withholding accrued employee benefits during a strike constituted an unfair labor practice.

absurd.* Moreover, the Board did not rely upon Wiegand's alleged antiunion motivation in establishing its new *per se* rule that employers may only terminate disability benefits to employees during a strike when those employees show public support for the strike, since employer intent is irrelevant under the Board's new test. (68a, 72a-73a).** The sole basis of the Board's decision simply was that the S&A benefits were accrued and hence could not be terminated when the strike began. (66a, 68a). The Board applied the exact same rationale and reached the exact same conclusion in its decision in *Vesuvius Crucible,* which the Third Circuit properly reversed.

The undisputed evidence is that Wiegand, like Vesuvius Crucible Co. with vacation pay, withheld sickness and accident benefits from all of its employees during the strike based upon its good faith interpretation of its expired contract with Local 1020 and its reliance upon prior Board precedent. Indeed, when Wiegand advised Local 1020 that it had no legal obligation to continue paying S&A benefits to bargaining unit employees if a strike occurred (4a, 113a-116a and Local 1020 Brief, 2) Local 1020 asserted then, as it does now, that S&A "benefits were due these employees under the contract." (Local 1020 Brief, 2, 5). Wiegand's position then, as it is now, is that its expired contract with Local 1020 expressly provides that S&A benefits are payable only when an employee is unable to work

* There is no support in the record or in logic for the Board's erroneous finding that Wiegand threatened to terminate S&A benefits in the event of a strike for the 23 employees who were receiving such benefits in order to attempt to coerce Wiegand's other 1100 employees who were not receiving such benefits not to strike.

** References to the appendix submitted in support of Wiegand's petition are designated as (——a), references to Wiegand's petition are designated as (Pet. ——), references to the briefs of the Board and Local 1020 in opposition to Wiegand's petition are designated as (Board Brief, ——) and (Local 1020 Brief, ——).

"*solely* because of injury or disease . . ." (emphasis added). (112a). In any event, the fact that Local 1020 and the Board disagree with Wiegand's interpretation of its contractual obligations does not show that Wiegand had any antiunion motivation. *Vesuvius Crucible Co., supra* and *Borden, Inc.*, 600 F.2d at 321.*

Moreover, Wiegand's decision to terminate S&A benefits to all of its employees during the strike also was based upon the Board's prior decision under strikingly similar factual circumstances in *Southwestern Electric Power Co.*, 216 NLRB 522 (1975). (113a-116a).** Thus, unlike the employers in *Borden* and *Vesuvius Crucible*, Wiegand not only relied upon the express language of its contract with Local 1020, but also relied upon established Board precedent in refusing to pay S&A benefits to its employees during the strike. Thus, the Board overruled *Southwestern Electric Power* in this case and and applied its new rule retroactively against Wiegand. Therefore, Wiegand was

* Local 1020 and the Board place great emphasis on the fact that Wiegand told Local 1020 of its legal obligations with respect to the payment of all benefits during the strike prior to the actual commencement of the strike. (Board Brief, 4-5, 11-12, Local 1020 Brief, 3-4). However, it is clearly in the interests of collective bargaining for the parties to discuss all potential issues before the onset of a strike. In fact, if Wiegand had waited until the strike began and unilaterally terminated S&A benefits to its employees, Local 1020 and the Board no doubt would claim that Wiegand acted in bad faith by failing to raise this issue before the strike began. Indeed, in *Stokely-Van Camp, Inc.*, 259 NLRB No. 128 at p. 9 n. 14 (January 7, 1982), the Board found that the employer violated Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), by cancelling benefits to employees during the strike without advance notice to, or bargaining with, the union.

** When Local 1020 filed an unfair labor practice charge over Wiegand's terminating S&A benefits, the Regional Director of the Board for the Sixth Region dismissed the charge on the basis of *Southwestern Electric Power*. (36a-38a). Moreover Board Member Penello, who supported Wiegand's position, rested his dissent on *Southwestern Electric Power*. (75a). Thus, at no time in the proceeding before the Board was Wiegand's antiunion motivation, or lack of it, necessary to the Board's holding in this case.

not only *penalized* for relying upon the express terms of its contract with Local 1020, it was further *penalized* for relying upon established Board precedent.

More important, contrary to the Third Circuit's decision in *Vesuvius Crucible*, 108 LRRM at 3211, and its decision in this case (14a-15a), the Board *never* relied upon Wiegand's alleged antiunion motivation to support its conclusion that accrued benefits may not be withdrawn during a strike. (68a). The "thrust of the Board's decision in *Wiegand* was that employees need not notify the employer that they are exercising their rights under Section 7 of the Act" and therefore Wiegand's alleged antiunion motivation was not the basis for the Board's decision. *Walter Motor Truck Co.*, 256 NLRB No. 166 at p. 8 (July 1, 1981).

In *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), the Court emphasized that:

> a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

Accord, First National Maintenance Corp. v. *NLRB*, 49 U.S.L.W. 4769, 4770 n. 6 (June 22, 1981); *FPC* v. *Texaco Inc.*, 417 U.S. 380, 397 (1974). Since the Third Circuit, in not reversing the Board in this case, relies exclusively upon an erroneous Board finding of antiunion motivation that was completely unnecessary to the Board's decision that S&A benefits, as accrued benefits, may not be terminated during a strike, this case should be remanded to the Board for further consideration in light of the Third Circuit's decision in *Vesuvius Crucible*.

The Third Circuit's decision in this case places employers in the same dilemma the Third Circuit sought to avoid in *Vesuvius Crucible*. If permitted to stand, the Third Circuit's decision here will force employers with a genuine and supportable belief that they have the right under their contracts and Board precedent to terminate benefits to strikers (a) to sacrifice their genuine and supportable belief by capitulating to union demands for such benefits, or (b) to be found guilty of an unfair labor practice.

The Court should therefore grant Wiegand's petition and clarify when employers may lawfully assert their contractual and legal rights to cease benefit payments to their employees during a strike. In all events, the Court should remand this case to the Board since the Third Circuit relies exclusively upon an erroneous finding which was not the basis of the Board's decision.

II

The Third Circuit and the Board failed to apply this Court's holdings in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

Wiegand's position is that its S&A benefits are wage substitutes, not accrued benefits (Pet. 14-19), and that an employer cannot be legally compelled to pay employees for time admittedly spent on the picket line or working in the union's strike office. (Local 1020 Brief, 3).* How-

* Significantly, a majority of the Board also concluded that Wiegand could not be compelled to pay S&A benefits to those employees who actively supported the strike. (67a-68a). The Third Circuit, however, reversed and went beyond this Board conclusion in holding that accrued benefits may not be divested by an employee's strike conduct—a far cry from the Third Circuit's *post hoc* contention that its decision rested on Wiegand's alleged antiunion motivation. Despite the Third Circuit's decision, the Board continues to apply the rule that an employee who actively supports a strike forfeits his rights to accrued benefits. *See Walter Motor Truck Co.*, 256 NLRB No. 166 (July 1, 1981).

ever, even when employee benefits are found to be accrued, the Board may find an employer's termination of such benefits to be an unfair labor practice only in the limited circumstances set forth in the Court's opinion in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

In *Great Dane*, the Court held that withholding employee benefits during a strike can be an unfair labor practice *only* if (a) the employer's conduct was motivated by antiunion animus, or (b) it can reasonably be concluded that the employer's conduct was " 'inherently destructive' of important employee rights." 388 U.S. at 34.

Wiegand already has shown that there is no support for a finding that Wiegand terminated S&A benefits at the expiration of its contract with Local 1020 because of antiunion motivation. It did so in reliance on its contract and on *Southwestern Electric Power Co., supra.* In any event, the majority of the Board did not rely upon any such finding in deciding that Wiegand could not terminate accrued S&A benefits during a strike until an employee evidenced public support for the strike.* Since the Board did not base its decision on Wiegand's alleged antiunion motivation, the Board could properly find that Wiegand committed an unfair labor practice only if Wiegand's actions were inherently destructive of its employees' rights. However, the Board and the Third Circuit never addressed the issue of whether the termination of S&A benefits to Wiegand's employees during the strike

* Had the Board relied on Wiegand's alleged antiunion motivation, it would have been illogical and inconsistent for the majority of the Board to conclude, as it did, that Wiegand could properly terminate during a strike an employee's accrued S&A benefits once the employee by words or action publicly supported the strike.

was inherently destructive of its employees' rights.* Indeed, the Third Circuit specifically held that it "need not decide the issue . . . because the Board had specifically found antiunion motivation in this case . . ." (14a-15a).

III

South Prairie Construction Co. v. *Local 627, International Union of Operating Engineers,* 425 U.S. 800 (1976) and *NLRB* v. *Food Store Employees Union, Local 347,* 417 U.S. 1 (1974) require that this case be remanded to the National Labor Relations Board.

The Court's decisions in *South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers,* 425 U.S. 800 (1976) and *NLRB* v. *Food Store Employees Union, Local 347,* 417 U.S. 1 (1974), clearly establish that courts of appeals may not alter legal conclusions of the Board and then enlarge the Board's remedy without remanding the case to the Board for reconsideration. *See also, FPC* v. *Idaho Power Co.,* 344 U.S. 17, 20-21, *rehearing denied,* 344 U.S. 910 (1952). This is particularly true here since the Third Circuit affirmed the Board's unfair labor practice finding and expanded the Board's remedy. Hence, contrary to the Board's and Local 1020's assertions (Board Brief, 14-15, Local 1020 Brief, 12-14), *South Prairie* and *Food Store Employees* are factually indistinguishable from this case and the Court's reasoning in those cases applies with equal force here.

In particular, the Third Circuit's failure to remand this case to the Board deprived the Board of the opportunity

* The Board now erroneously asserts *for the first time* that Wiegand's action in refusing to pay S&A benefits during the strike was somehow inherently destructive of employee rights and therefore no proof of antiunion motivation is needed to sustain the unfair labor practice finding against Wiegand. (Board Brief, p. 11, n. 10).

to make additional findings concerning Wiegand's alleged antiunion motivation, to consider that ground as a basis for its decision, to determine whether Wiegand's actions were inherently destructive of important employee rights, to correct erroneous factual findings, to decide whether the Third Circuit's decision as to the remedy should be applied retroactively and to construct a remedy that would best effectuate the purposes of the Act. In addition, a remand in this case could have eliminated the current conflict between the Board and the Third Circuit as to which employees, if any, are entitled to S&A benefits during a strike. *See, Walter Motor Truck Co., supra.**

Conclusion

The Court should grant Wiegand's petition for a writ of certiorari.

Dated: New York, New York
February 10, 1982

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* In addition, *Retail Clerks Locals 128 and 633* v. *Lion Dry Goods, Inc.*, 369 U.S. 17 (1962) compelled the Board to honor the express terms of the strike settlement agreement between Wiegand and Local 1020 which required Local 1020 to withdraw the charge in this case. (109a-111a). "[C]ertainty that a settlement agreement will indeed settle the dispute of the parties is needed to encourage voluntary settlement." *Gulf States Manufacturers, Inc.* v. *NLRB*, 598 F.2d 896, 902 (5th Cir. 1979).